Requiring Robust NEPA Analysis for Fossil Fuel Projects: A Promising Trend in the Tenth Circuit

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Since President Trump took office in 2017, the Bureau of Land Management and other executive agencies have pursued expansive and aggressive development of fossil fuel resources on public lands. This development will add to the United States' already large contribution to climate change. Unfortunately, those seeking to convince the U.S. government to mitigate the nation's contribution to climate change have faced barriers through all branches of government. Congress has failed to pass comprehensive legislation to address climate change, and most of the progress made through the executive branch has been undone by President Trump. That leaves the courts—but how promising of an avenue is the judicial branch for those seeking to mitigate climate change?

While federal courts have historically declined to provide broad relief in cases related to climate change, a promising trend has emerged in the Tenth Circuit. The Tenth Circuit Court of Appeals and several district courts within the Tenth Circuit are holding the Bureau of Land Management and other executive agencies accountable for failing to comply with the National Environmental Policy Act when enabling fossil fuel development. Although the relief these courts can provide is limited to the challenged agency decisions before them and by the procedural nature of the statute, this line of cases has potential to limit the executive branch's aggressive pursuit of fossil fuel development and thus slow the United States' contribution to climate change. This Note presents a case study of the trend in the Tenth Circuit and argues that it cannot be explained by precedent or judicial ideology. Rather, the five key factors explaining the trend are rooted in the National Environmental Policy Act's fundamental purposes and

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requirements. After introducing the primary cases within this trend and outlining its key factors, this Note provides reasons for caution and suggests litigation strategies for those seeking to capitalize on the trend to limit further contributions to climate change.

INTRODUCTION

Plaintiffs seeking to address climate change through the United States federal courts have faced an uphill battle. The legislative and executive branches are largely to blame for the United States' failure to sufficiently mitigate climate change.[1] Meanwhile, no clear judicial avenue exists to hold the legislative and executive branches accountable for this failure. Without a strong statutory scheme for addressing climate change, which courts could enforce through judicial review, the federal common law is not developing quickly enough to provide relief for harms related to climate change.[2] Furthermore, many federal courts have framed claims about climate change harms and solutions as beyond their jurisdiction.[3] Instead, as many district courts have explained, the political branches should address the difficult questions surrounding climate change because they are more directly accountable to the people.[4]

This explanation holds less merit in a context where the political branches have failed to take sufficient action on climate change. The executive and legislative branches of the U.S. government have not kept the country on pace to reduce its greenhouse gas (GHG) emissions at levels consistent with international targets.[5] Far from it. And while the executive branch made some

1. *See generally infra* Subpart I.A.

2. *See, e.g.*, Am. Elec. Power Co. v. Conn., 564 U.S. 410, 429 (2011) (denying injunctive relief to plaintiffs seeking to abate an electric utility's greenhouse gas emissions); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 869 (9th Cir. 2012), *infra* note 61 (denying monetary relief to plaintiff Tribe seeking damages to assist in relocation due to impacts of climate change).

3. *See, e.g.*, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009); City of Oakland v. B.P., P.L.C., 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018).

4. *See, e.g.*, *Native Vill. of Kivalina*, 663 F. Supp. 2d at 883 (N.D. Cal. 2009) (dismissing case seeking damages for climate change-related harms due in part to the political question doctrine); *City of Oakland*, 325 F. Supp. 3d at 1029 (dismissing case seeking damages for climate change-related harms, finding legislative and executive solutions more appropriate than a judicial resolution).

5. While the United States pledged under the Paris Agreement to reduce emissions to 26 to 28 percent below 2005 levels by 2025, the country's current policies are projected to result in only a 10 to 12 percent reduction of emissions below 2005 levels by 2025. John Larsen et al., *Taking Stock 2018*, RHODIUM GROUP (June 28, 2018), https://rhg.com/research/taking-stock-2018/. The United States is currently on track to only exceed the upper limit of its 2020 emissions target under the Paris Agreement by 1 or 2 percent, but the Climate Action Tracker projects the Trump administration's policies could lead to the United States emitting more than 400 MtCO2e above the amount of emissions projected at the beginning of President Trump's term, which is equivalent to nearly as much as California's total emissions in 2016. *Country Summary USA*, CLIMATE ACTION TRACKER (accessed Nov. 8, 2019), https://climateaction tracker.org/countries/usa/. Most of the United States' progress on meeting its international climate targets is due to the actions of states, such as California, along with the increase in renewable energy sources and decommissioning of coal power plants. Brittany Gibson, *The Industrialized World is Failing to Meet Paris Agreement Goals*, THE AM. PROSPECT (Oct. 1, 2019), https://prospect.org/world/climate-crisis-industrialized-world-failing-to-meet-paris-agreement/. If the United States is able to meet the 2030 emissions targets set by President Obama, it will be "only accidentally." *Id.* While President Trump's "unravel[ing of] Obama-era climate and clean energy policies" has slowed the country's progress toward

notable—yet insufficient—progress under President Obama's leadership,[6] the situation has darkened under President Trump's administration. The current administration is not just failing to take additional needed steps to reduce the United States' GHG emissions.[7] It has also taken aggressive measures to increase the country's production of fossil fuels and to reduce environmental regulations,[8] in direct contradiction to climate change mitigation. To be sure, the outcome of the 2020 presidential election bodes well for executive action on climate change.[9] Nevertheless, as long as developers continue to build fossil fuel projects on public lands, federal courts will remain important safeguards of the need for proper consideration of climate change impacts.

Without an overarching statutory scheme or federal common law tailored to addressing climate change, the National Environmental Policy Act (NEPA) has enabled some federal courts to require more serious consideration of the environmental impacts of projects that contribute to climate change. Many such NEPA cases have emerged in the U.S. Court of Appeals for the Tenth Circuit and its associated district courts. Several of these courts are holding the U.S. Bureau of Land Management (BLM) and other executive agencies accountable for NEPA violations when enabling fossil fuel development projects.[10] This Note presents a case study of this trend in the Tenth Circuit, where courts are reminding the executive branch that it cannot skirt NEPA's statutory requirements in its quest to enable further fossil fuel development.[11] This is not a completely new phenomenon, as federal courts have weighed agencies'

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meeting its international climate goals, it is true that "tailwinds in the form of cheap renewables and natural gas, steadily declining electric battery prices, and reinforced subnational policies have largely sustained the momentum built over the past few years, keeping US greenhouse gas (GHG) emissions on the downswing." Larsen et al., *supra* note 5.

6. The Obama administration's Clean Power Plan and Climate Action Plan were projected to enable the United States to meet its 2025 emissions reduction target under the Paris Agreement. CLIMATE ACTION TRACKER, *supra* note 5. Yet, even the United States' Paris Agreement target, which the Obama administration set, is "not yet consistent with limiting [global] warming to below 2 C, let alone with the Paris Agreement's stronger 1.5 C limit . . ." *Id.*

7. Under the Trump administration, there is a lack of national leadership on climate change mitigation efforts and "a concerted effort to block state actions that would reduce emissions . . . " Julia Rosen, *Cities, states and companies vow to meet U.S. climate goals without Trump. Can they?*, LOS ANGELES TIMES (Nov. 4, 2019), https://www.latimes.com/environment/story/2019-11-04/cities-states-companies-us-climate-goals-trump. For more details on the Trump administration's failure to implement stronger climate policies and efforts to roll back existing climate mitigation efforts, *see* Larsen et al., *supra* note 5.

8. *See generally infra* Subpart I.A.

9. *See infra* notes 53–55 for a discussion of President-Elect Biden's and Vice President-Elect Harris's commitments to climate action.

10. *See, e.g.*, Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 859 (10th Cir. 2019); WildEarth Guardians v. Bureau of Land Mgmt., 870 F.3d 1222, 1233–34, 1236 (10th Cir. 2017); Wilderness Workshop v. Bureau of Land Mgmt., 342 F. Supp. 3d 1145, 1167 (D. Colo. 2018); Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1233–37 (D. Colo. 2019); San Juan Citizens Alliance v. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1244, 1254 (D.N.M. 2018).

11. *See, e.g.*, *Diné Citizens*, 923 F.3d at 859; *WildEarth Guardians*, 870 F.3d at 1233–34, 1236; *Wilderness Workshop*, 342 F. Supp. 3d at 1167; *Citizens for a Healthy Cmty.*, 377 F. Supp. 3d at 1233–37; *San Juan Citizens Alliance*, 326 F. Supp. 3d at 1244, 1254.

analyses of climate change under NEPA for nearly two decades.[12] Yet, it has become increasingly important under the Trump administration's pursuit of its aggressive fossil fuel development agenda.[13] Although courts have historically been deferential to agencies in NEPA review,[14] district courts in the Tenth Circuit and the Court of Appeals itself now appear less willing to defer to agencies, which may signal the start of a nationwide shift. This trend toward a less deferential posture may become especially important for enforcing the statute as the Trump administration proposes to weaken foundational NEPA regulations.[15]

Using the Tenth Circuit as a case study, this Note demonstrates that NEPA provides an avenue for federal courts to limit the executive branch's unabashed pursuit of fossil fuel development. NEPA does not enable courts to single-handedly compensate for the executive and legislative branches' failures to broadly mitigate GHG emissions. Yet, it provides both a procedural avenue for slowing the pace of fossil fuel development and the ability to expose the substantive environmental harms of such development. The Tenth Circuit is not the only circuit in which litigants are challenging BLM's approval of fossil fuel projects for failing to comply with NEPA, but consideration of the trend in other circuits and a comparison among circuits is beyond the scope of this Note.[16] The Tenth Circuit is an important battleground for NEPA decisions involving fossil fuel development on public lands, as the vast majority of the country's federal public lands—and in particular, those administered by BLM—are located in western states, including those comprising the Tenth Circuit.[17] To better

12. *See* Arnold W. Reitze, Jr., *Dealing with Climate Change under the National Environmental Policy Act*, 43 WILLIAM & MARY ENVTL. L & POL'Y REV. 173, 197 (2018).

13. *See generally infra* Subpart I.A.

14. Although there are cases going back two decades, "[j]udicial review of NEPA-based analyses of climate change issues rarely occurs" given the high costs of litigation and NEPA's procedural nature, which does not require mitigation. Reitze, *supra* note 12 at 217. When such cases do arise, "courts are usually deferential to agency judgment calls." *Id.*

15. *See infra* notes 40–52.

16. Similar case studies of other circuits, and comparisons among circuits, would be a welcome contribution to the literature.

17. Ninety-three percent of federal public lands are located within the country's thirteen western states. *See* Niraj Chokshi, *More Than Half the West is Federally Owned. Now Some States Want That Land*, WASH. POST (Oct. 15, 2013, 12:45 PM), https://www.washingtonpost.com/blogs/govbeat/wp/2013/10/15/almost-half-the-west-is-federally-owned-now-some-states-want-their-land-back/. BLM is the federal agency that controls the most public lands. *See* Quoctrung Bui & Margot Sanger-Katz, *Why the Government Owns So Much Land in the West*, N.Y. TIMES (Jan. 5, 2016), https://www nytimes.com/2016/01/06/upshot/why-the-government-owns-so-much-land-in-the-west.html. Nearly all of the lands BLM administers—99.4 percent—are located in Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. *See* CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., 7-5700, Federal Land Ownership: Overview and Data 7 (2017). The federal government owns the following proportions of land in states in the Tenth Circuit: 63.1 percent in Utah, 48.4 percent in Wyoming, 35.9 percent in Colorado, 35.4 percent in New Mexico, 1.6 percent in Oklahoma, and 0.5 percent in Kansas. *See id.* In contrast, the federal government only owns 4 percent of lands east of the Mississippi River. *See* Bui & Sanger-Katz, *supra* note 17. States in the Ninth Circuit also host a large proportion of public lands, including Nevada, Montana, Idaho, California, Alaska, and

understand the potential for NEPA to enable federal courts to require stronger consideration of projects' climate change impacts, this Note explores the reasons for and limitations of this trend in the Tenth Circuit.

This Note argues that the Tenth Circuit trend cannot be explained by precedent alone or by predictable markers of judicial ideology. Instead, five key factors explain the decisions of the Tenth Circuit Court of Appeals and several of its associated district courts to require executive agencies to more robustly comply with NEPA requirements when approving fossil fuel development projects. Tenth Circuit courts are watching closely for BLM's failure to adequately consider (1) indirect impacts of its proposed actions, (2) cumulative impacts of its proposed actions, and (3) reasonable alternatives, as well as BLM's attempts to (4) rely on irrational assumptions or contradictory claims, and (5) undermine NEPA's most basic goal of enabling informed decision making.

After outlining in Part I how the U.S. government has failed to sufficiently mitigate climate change, this Note provides a brief overview of the relevant provisions of NEPA and its related regulations in Part II. Part III introduces the key cases representing this new trend in the Tenth Circuit, including the 2019 case *Diné Citizens Against Ruining Our Environment v. Bernhardt* (*Diné Citizens*).[18] Part IV argues that neither precedent nor judicial ideology explain the trend and identifies the five factors that influence courts' decisions to hold BLM accountable for NEPA violations. It also includes reasons for caution against relying too heavily on this trend, which is not universal and does not always result in further NEPA analysis. In Part V, this Note recommends litigation strategies for environmental advocates to best capitalize upon this trend in Tenth Circuit courts.

I. THE U.S. GOVERNMENT HAS FAILED TO SUFFICIENTLY ADDRESS CLIMATE CHANGE

The federal government has yet to adequately address the existential threat of climate change. Congress has failed to pass comprehensive legislation needed to realistically mitigate the United States' substantial contributions to climate change.[19] Under the Obama administration, the executive branch made some progress in addressing climate change by implementing the Clean Power Plan, passing rules to reduce methane leaks from oil and gas drilling wells, tightening

Arizona. *See* Vincent et al., *supra* note 17. *See infra* note 109 for a brief discussion of similar cases in district courts in the Ninth Circuit and D.C. Circuit.

18. 923 F.3d 831 (10th Cir. 2019).

19. A survey of the U.S. Congress's attempts and failures to pass legislation to mitigate climate change is beyond the scope of this paper. For more information, *see* DANIEL A. FARBER & CINNAMON P. CARLARNE, CLIMATE CHANGE LAW 102, 151 (2018) (discussing the U.S. Congress's failure to pass "major climate change legislation," including the 2009 Waxman-Markey bill, which would have created a domestic GHG emissions trading scheme).

fuel efficiency standards, and more.[20] However, since the very beginning of the Trump Presidency, his administration has rolled back gains made under the Obama administration[21] and promoted policies that present further obstacles to addressing climate change.[22] Federal courts have not yet recognized an alternative pathway to relieve harms stemming from climate change through federal common law.

A. The Trump Administration's Efforts to Obstruct Climate Action

The Trump administration has intentionally stymied the United States' climate change mitigation efforts.[23] The administration's removal of the United States from the international Paris Agreement under the United Nations Framework Convention on Climate Change recently became effective.[24] The

20. *See* John Schwartz, *Major Climate Change Rules the Trump Administration is Reversing*, N.Y. TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/climate/climate-rule-trump-reversing.html.

21. "The Trump Administration's efforts to comprehensively dismantle Obama-era policies" include reducing the size of national monuments and "a widespread fostering of fossil fuel-friendly policies." Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution Redefining "The Public" in Public Land Law*, 48 ENVTL. L. 2, 311–13 (2018). BLM also repealed the 2015 fracking regulations passed under the Obama administration. *Id.* at 359. Under President Trump's command, the Environmental Protection Agency (EPA) has proposed to repeal the Clean Power Plan and replace it with the Affordable Clean Energy Rule, "the administration's most sweeping plan to extend the lives of coal-burning plants and shore up the mining industry." Schwartz, *supra* note 20. For comprehensive surveys of how the Trump administration has rolled back efforts to address climate change and protect the environment, *see* Michael Greshko et al., *A Running List of How President Trump is Changing Environmental Policy*, NAT'L GEOGRAPHIC (May 3, 2019), https://nationalgeographic.com/news/2017/03/how-trump-is-changing-science-environment/; Nadja Popovich et al., *85 Environmental Rules Being Rolled Back Under Trump*, N.Y. TIMES (updated Sept. 12, 2019), https://nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html; Anthony E. Ladd, *Hydraulic fracking, shale energy development, and climate inaction A new landscape of risk in the Trump Era*, 23 HUMAN ECOLOGY REV. 1, 67 (2017) ("Not only has Trump vowed to increase oil and gas fracking, create more energy infrastructure projects, ramp up foreign fossil fuel exports, resurrect the Keystone XL and Dakota Access pipelines, bring coal production back to Appalachian communities, and revitalize the dormant nuclear power industry, but also dismantle most of the signature policies of the Obama administration to support renewable energy and fight the effects of climate change.")

22. *See generally infra* Subpart I.A.

23. President Trump "moved rapidly to reverse Obama-era policies aimed at allowing the United States to meet its pollution-reduction targets as set under the [Paris] agreement." Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html.

24. In 2017, President Trump announced that the United States would withdraw from the Paris Agreement. Shear, *supra* note 23. In November of 2019, the Trump administration officially began the process to withdraw the United States from the Paris Agreement by formally notifying the United Nations of its withdrawal, which became effective on November 4, 2020. Rebecca Hersher, *U.S. Formally Begins to Leave the Paris Climate Agreement*, NAT'L PUB. RADIO (Nov. 4, 2019), https://www.npr.org/2019/11/04/773474657/u-s-formally-begins-to-leave-the-paris-climate-agreement; Jim Daley, *U.S. Exits Paris Climate Accord after Trump Stalls Global Warming Action for Four Years*, SCIENTIFIC AMERICAN (Nov. 4, 2020), https://www.scientificamerican.com/article/u-s-exits-paris-climate-accord-after-trump-stalls-global-warming-action-for-four-years/; Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html. The United States is the only country to have initiated withdrawal from the Paris Agreement. Gibson, *supra* note 5.

president has also directed an aggressive domestic fossil fuel development strategy,[25] despite the fossil fuel industry's progressive decline.[26]

President Trump vowed in 2017 that his administration would "propel [a] new era of American energy dominance."[27] Under his leadership, the Department of Interior (DOI) has enabled oil and gas development on more than seventeen million acres of public lands.[28] In 2017, BLM made six times more public lands available for oil and gas leasing than it had in the previous year, while making it easier to obtain a lease.[29] The Trump administration has also repealed or threatened to repeal several regulations related to fossil fuel extraction. These include safety regulations for offshore oil and gas drilling and rules to limit GHG emissions from coal-fired power plants and methane emissions from oil and gas extraction.[30] These actions, and many others, demonstrate that the executive branch under President Trump is not only failing to take bolder action to address climate change, but is in fact enabling increased GHG emissions through its "'energy dominance' agenda."[31]

Finally, the Trump administration is reducing the extent to which agencies must consider climate change in NEPA analysis. In 2017, the administration rolled back Council on Environmental Quality (CEQ) guidelines on factoring climate change and GHG emissions into NEPA analyses.[32] Under the Obama

25. Trump has led a revolution to decrease protections for public lands, including widespread actions to enable a large increase in fossil fuel extraction from public lands, seemingly "prepared to make public land mineral leasing . . . the centerpiece of his version of energy dominance." *See* Blumm & Jamin, *supra* note 21, at 315.

26. Carbon Tracker predicts worldwide demand for fossil fuels to peak in 2023, due to the growth in availability and reduction in cost of renewable energy sources like solar and wind energy, climate change mitigation efforts, and a reduction in the pace of energy demand growth. Adam Vaughan, *Global Demand for Fossil Fuels Will Peak in 2023, Says Thinktank*, GUARDIAN (Sept. 11, 2018), https://www.theguardian.com/business/2018/sep/11/global-energy-demand-fossil-fuels-oil-gas-wind-solar-carbon-tracker. Demand for coal has already peaked. *Id.*; *See also* Bill McKibben, *Some Rare Good Climate News The Fossil Fuel Industry is Weaker Than Ever*, GUARDIAN (June 21, 2018), https://www.theguardian.com/commentisfree/2018/jun/21/climate-change-fossil-fuel-industry-never-been-weaker; Jeremy Deaton, *The Fossil Fuel Industry's Dirty Secret Climate Action or Not, Things Look Bad*, GREENBIZ (Sept. 28, 2018), https://www.greenbiz.com/article/fossil-fuel-industrys-dirty-secret-climate-action-or-not-things-look-bad.

27. *Remarks by President Trump at the Unleashing American Energy Event*, WHITE HOUSE, (June 29, 2017, 3:31PM), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-unleashing-american-energy-event/.

28. Between February of 2017 and April of 2019, DOI offered 17,720,011 acres for oil and gas lease sales. Hannah Rider & Lucy Livesay, *Trump's Energy Dominance Agenda Keeps Losing in the Courts*, MEDIUM (Apr. 25, 2019), https://medium.com/westwise/trumps-energy-dominance-agenda-keeps-losing-in-the-courts-c0a590a1915d.

29. Cooper McKim, *Trump Push for Energy Dominance' Boosts Drilling on Public Land*, NAT'L PUB. RADIO (Nov. 25, 2018), https://www.npr.org/2018/11/25/666373189/trump-push-for-energy-dominance-boosts-drilling-on-public-land.

30. Greshko et al., *supra* note 21.

31. Pamela King, *Courts Derail Trump's March to Energy Dominance,'* E&E NEWS (Apr. 29, 2019), https://www.eenews.net/stories/1060234511. For more information on the Trump Administration's efforts to block U.S. climate mitigation efforts, *see* CLIMATE ACTION TRACKER, *supra* note 5.

32. Reitze, *supra* note 12, at 181–82.

administration, CEQ had issued its final guidance on the subject, which required agencies to quantify direct and indirect GHG emissions when possible.[33] CEQ confirmed that climate change is "a fundamental environmental issue [whose] effects fall squarely within NEPA's purview."[34] Yet, the Trump administration withdrew this CEQ guidance[35] and issued a draft replacement guidance.[36] The new guidance streamlines NEPA review and encourages agencies to only quantify a proposed action's direct impacts on GHG emissions when they are "substantial enough to warrant quantification."[37] It enables more deference to agencies than the previous guidance about how to consider GHG emissions.[38] Yet, as discussed throughout this Note, the Trump Administration's weakening of CEQ guidelines for climate change analysis has not stopped courts from requiring agencies to properly consider their proposed actions' direct, indirect, and cumulative impacts on climate change.[39] In the first days of 2020, however, the Trump administration proposed changes to NEPA with the potential to far more significantly limit agencies' consideration of climate change and other environmental impacts of fossil fuel projects. CEQ proposed several changes to NEPA regulations, including to no longer require agencies to consider the cumulative impacts of their proposed actions.[40] The notice of proposed rulemaking (NPRM) explained the changes were intended to "modernize and clarify the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies . . . ."[41] It also acknowledged the prominent role of federal courts in interpreting NEPA requirements and purports to "codify longstanding case law in some instances" and otherwise clarify NPRM

33. *Id.*

34. Council on Envtl. Quality, *Memorandum for Heads of Fed. Dep'ts and Agencies*, Final Guidance for Fed. Dep'ts & Agencies on Consideration of Greenhouse Gas Emissions & Effects of Climate Change in Nat'l Envtl. Policy Act Reviews 1 (2016).

35. Reitze, *supra* note 12, at 182, 185. The Federal Energy Regulatory Commission also announced in 2018 that it no longer plans to consider indirect impacts on climate change from certain proposed natural gas pipelines under NEPA. Ellen M. Gilmer, *FERC and Climate Change Where Are we Now?*, E&E NEWS (June 5, 2018), https://www.eenews.net/stories/1060083465. Its regulators said they would only consider the GHG emissions of natural gas production and consumption emanating from pipelines they approved if there was information about the natural gas' source or end use. *Id.*

36. *See* Valerie Volcovici, *Trump Administration Issues Guidance for Federal Agencies to Weigh Climate Impacts*, REUTERS (June 21, 2019), https://www.reuters.com/article/us-usa-climate-nepa/trump-administration-issues-guidance-for-federal-agencies-to-weigh-climate-impacts-idUSKCN1TM2AN.

37. *Id.*

38. *See* Randy Brogdon et al., *A Clear Shift in Policy CEQ Issues Draft Guidance for Consideration of Greenhouse Gas Emissions Under NEPA*, ENVTL. L. & POL'Y MONITOR (July 3, 2019), https://www.environmentallawandpolicy.com/2019/07/a-clear-shift-in-policy-ceq-issues-draft-guidance-for-consideration-of-greenhouse-gas-emissions-under-nepa/.

39. *See* Volcovici, *supra* note 36.

40. *See* Update to the Regulations Implementing the Procedural Provisions of the Nat'l Envtl. Policy Act, 85 Fed. Reg. 1684, 1729 (proposed Jan. 10, 2020) (to be codified at 40 C.F.R. pts. 1500–08).

41. *See id.* at 1684. The NPRM also refers to the fact that NEPA review and related litigation can "slow [] or prevent [] the development of new infrastructure or other projects . . . ." *See id.* at 1685.

regulations about which courts disagree.[42] Of most relevance here, CEQ proposed to remove the distinction between a project's direct, indirect, and cumulative effects, so that agencies can focus on "considering whether an effect is caused by the proposed action rather than on categorizing the type of effect."[43] Furthermore, the NPRM explicitly stated that agencies are not required to analyze cumulative effects, as currently defined under CEQ regulations.[44] The NPRM also proposed time limits on environmental reviews under NEPA.[45] Although CEQ chairwoman Mary Neumayr stated that the proposed rules would not remove GHG emissions from consideration under NEPA,[46] the regulation changes do not bode well for agencies' consideration of climate change impacts.[47] The regulations were finalized in July 2020,[48] largely confirming the proposed changes in the NPRM.[49]

Litigation is already underway to challenge these changed NEPA regulations,[50] although it remains too early to tell how the proposal will hold up to such lawsuits[51] or the extent to or speed with which the Biden administration

42. *See id.* at 1688 (noting that "[t]he Supreme Court has addressed directly NEPA in 17 decisions and the United States district and appellate courts issue approximately 100 to 140 decisions each year interpreting NEPA").

43. *Id.* at 1708. The NPRM highlights that commenters have "raised concerns" about the confusion caused by these terms, how they have been "interpreted expansively," and how this has led to "excessive documentation about speculative effects and . . . frequent litigation." *See id.* at 1707. It acknowledges that its proposed changes aim "[t]o address commenters' concerns and reduce confusion and unnecessary litigation." *Id.* at 1708.

44. *See id.* at 1708, 1729 ("Analysis of cumulative effects is not required."). In the NPRM, the CEQ clarifies that this change is intended "to focus agencies on analysis of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action," rather than "conduct[ing] exhaustive research on identifying and categorizing actions beyond the agency's control." *See id.* at 1708.

45. The NPRM proposed limiting Environmental Assessments to one year and Environmental Impact Statements (EIS) to two years. Stephen Lee, *White House to Ease Environmental Permits for Major Projects (1)*, BLOOMBERG L. NEWS (Jan. 9, 2020), https://www.bloomberglaw.com/product/es/document/XCMLCCNC000000.

46. *See id.*; Kelsey Brugger, *Trump Unveils Landmark Rewrite of NEPA Rules*, E&E NEWS (Jan. 9, 2020), https://www.eenews.net/stories/1062036913/print (explaining that Chairwoman Neumayr stated in a call with reporters that the proposed regulation changes "do not exclude considerations of greenhouse gas emissions" from NEPA analysis).

47. *See* Lee, *supra* note 45.

48. Update to the Regulations Implementing the Procedural Provisions of the Nat'l Envtl. Policy Act, 85 Fed. Reg. 43,304, 43,304–43,376 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–18).

49. Andrea Wortzel et al., *CEQ Final Rule Overhauls NEPA Regulations*, ENVTL. LAW & POL'Y (July 21, 2020), https://www.environmentallawandpolicy.com/2020/07/ceq-final-rule-overhauls-nepa-regulations/. The preamble of the final rule states that "the analysis of the impacts on climate change will depend on the specific circumstances of the proposed action," indicating a slight change from the NPRM to "l[eave] open the ability for agencies to consider effects of greenhouse gases" by not precluding—but also not requiring—consideration of cumulative and indirect climate change impacts. *See id.*

50. *See* Edward McTiernan et al., *CEQ Finalizes Comprehensive Changes to NEPA Regulations*, ARNOLD & PORTER (July 30, 2020), https://www.arnoldporter.com/en/perspectives/publications/2020/07/ceq-finalizes-changes-to-nepa-regs.

51. *See, e.g.*, Lisa Friedman, *Trump's Move Against Landmark Environmental Law Caps a Relentless Agenda*, N.Y. TIMES (Jan. 9, 2020), https://www.nytimes.com/2020/01/09/climate/trump-nepa-environment html.

will be able reverse these changes. Nevertheless, this proposed regulation poses a threat to NEPA's effectiveness in requiring agencies to fully consider the impacts of the fossil fuel projects they enable. It may limit the continued impact of the Tenth Circuit trend discussed throughout this Note and of similar cases in other circuits, especially when courts' reasoning is rooted in the language of current CEQ regulations rather than in NEPA's statutory language or purposes.[52] Accordingly, Part V of this Note recommends a multi-pronged approach to litigation strategies that does not rely solely on challenging cumulative impact analyses.

In sharp contrast with President Trump's energy dominance approach, the incoming administration appears prepared to begin a new era of climate action. President-Elect Biden and Vice President-Elect Harris campaigned on a platform of "lead[ing] the world in addressing the climate emergency," in part by achieving net-zero GHG emissions for the United States by 2050.[53] President-Elect Biden has pledged to rejoin the Paris Agreement upon his inauguration[54] and reportedly plans for the executive branch to address climate change not only though the Environmental Protection Agency but also through agencies ranging from the Department of Agriculture to the Department of the Treasury.[55] Yet, despite promising progress in terms of executive action on climate change, the role of the judiciary in requiring serious consideration of climate change impacts remains important for fossil fuel projects already approved or still to be approved by the Trump administration, as well as for actions taken by any potential future administrations similarly hostile to climate action.

B. The Judiciary Has Not Recognized a Common Law Path for Protecting the Climate

Throughout the past two decades, federal courts have been hesitant to provide broad climate change relief. The legislative and executive branches have largely avoided passing statutes and regulations requiring substantial mitigation of climate change,[56] whose violation could enable courts to order GHG emissions mitigation or compensation for existing climate change harms. In the

52. *See* Ellen M. Gilmer & Stephen Lee, *Trump Aims to Reel in Climate Reviews While Courts Say Otherwise*, BLOOMBERG L. NEWS (Jan. 9, 2020), https://www.bloomberglaw.com/product/es/document/X6447SA4000000 (explaining that the extent to which the CEQ regulations will limit the precedential effect of recent court rulings requiring consideration of climate change impacts may depend on whether the courts grounded their holdings in language from CEQ regulations or NEPA itself).

53. *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, JOEBIDEN.COM (last visited Nov. 11, 2020), https://joebiden.com/climate-plan/.

54. Leslie Hook, *Biden Shift on Climate Change Welcomed by World Leaders*, FIN. TIMES (Nov. 8, 2020), https://www.ft.com/content/5ce99af6-e776-43af-9c74-593d49dc5125.

55. Juliet Eilperin & Annie Linskey, *How Biden Aims to Amp up the Government's Fight against Climate Change*, WASH. POST (Nov. 11, 2020, 7:05 AM), https://www.washingtonpost.com/climate-environment/2020/11/11/biden-climate-change/.

56. *See generally supra* Part I, Subpart I.A.

absence of such a statutory framework, courts have not recognized an alternative means to address climate change through federal common law.

The Supreme Court has recognized the need to regulate some GHG emissions, but it and other courts have declined to fashion common law remedies for climate change harms. In *Massachusetts v. EPA*, the Court held that the U.S. Environmental Protection Agency (EPA) could not categorically avoid regulating tailpipe GHG emissions under the Clean Air Act (CAA) but was instead required to consider regulating such emissions.[57] While this "landmark" decision facilitated climate change mitigation under an existing statute,[58] it did not engender a wave of climate-friendly holdings under common law. In *American Electric Power Co. v. Connecticut*, the Supreme Court denied injunctive relief to plaintiffs alleging a federal public nuisance and seeking an injunction to abate a power utility's GHG emissions.[59] The Court determined that Congress had displaced such relief under federal common law through the CAA and by delegating EPA authority to regulate GHG emissions.[60] Similarly, in *Native Village of Kivalina v. ExxonMobil Corp.* (*"Kivalina II"*), the Ninth Circuit denied monetary relief to a Tribe seeking damages under public nuisance law to relocate its community due to climate change.[61] Thus, the federal common law has not yet enabled either injunctive or monetary relief for plaintiffs seeking to mitigate or adapt to climate change.[62]

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57. 549 U.S. 497, 528 (2007). The Court found that the CAA gave EPA authority to regulate tailpipe GHG emissions, as such emissions that fit under the broad definition of an "air pollutant" whose emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" in section 202(a)(1) of the Act. *See id.* at 528–29, quoting 42 U.S.C. § 7521(a)(1). Thus, the CAA required EPA to consider regulating such emissions, although it did not determine whether EPA was required to do so. *See id.* at 533–34. However, the use of the word "judgment" in section 202(a)(1) did not give the EPA Administrator "a roving license to ignore the statutory text," rather to "exercise discretion within defined statutory limits." *Id.* at 533.

58. The case is considered "one of the most important environmental cases in our nation's history" and a "landmark" decision for addressing climate change. Ben Levitan, *The Tenth Anniversary of Massachusetts v. EPA*, ENVTL. DEF. FUND (Apr. 2, 2017), http://blogs.edf.org/climate411/2017/04/02/the-tenth-anniversary-of-massachusetts-v-epa/. *See also* Mark Kaufman, *A Landmark Climate Change Ruling Could Go Up in Smoke After Justice Kennedy Retires*, MASHABLE (June 30, 2018), https://mashable com/article/kennedy-supreme-court-climate-massachusetts-epa/.

59. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 429 (2011).

60. *Id.*

61. 696 F.3d 849 (9th Cir. 2012). The Ninth Circuit determined that the Supreme Court's holding in *American Electric Power Co.* applied and that the CAA and EPA's authority similarly displaced the Tribe's requested relief. *Id.*

62. However, the progress of some recent cases suggest that federal courts may be willing to enable such cases to proceed under state common law. *See*, *e.g.*, State of Rhode Island v. Shell Oil Prods. Co., 19-1818 (1st Cir. 2019) (rejecting defendant fossil fuel companies' appeal to stay the district court's remand order to state court); Mayor & City of Baltimore v. BP P.L.C., 19-1644 (4th Cir. 2019) (rejecting defendant fossil fuel companies' appeal to delay the district court's remand order to state court). The Fourth Circuit holding in *Mayor & City of Baltimore* paves the way for discovery to begin, allowing the case to "reach [] a new stage that no other climate change nuisance case has." Ann Carlson, *Let Discovery Begin!*, LEGALPLANET (Oct. 1, 2019), https://legal-planet.org/2019/10/01/let-discovery-begin/. Fossil fuel companies have also urged the Tenth Circuit to preclude state courts from deciding cases seeking compensation for climate change-related harms under state common law. *See, e.g.*, Brief of Appellants,

Courts often dismiss claims seeking relief for climate change-related harms based on the political question doctrine.[63] The doctrine contends that some issues are more political than legal in nature and accordingly "must be resolved by the political branches rather than by the judiciary."[64] In *Native Village of Kivalina v. ExxonMobil Corp* (*"Kivalina I"*), the district court dismissed the Tribe's suit, holding that the political question doctrine prevented it from deciding the case.[65] Likewise, in *City of Oakland v. BP P.L.C.*, the district court explained that while it had authority to provide common law remedies for climate change-related claims, it would "stay its hand in favor of solutions by the legislative and executive branches."[66] The federal government similarly argued that the *Juliana v. United States* case—in which youth plaintiffs alleged that the federal government has contributed to climate change and must develop national mitigation policies—should be dismissed under the political question doctrine.[67] Despite these rationales for deferring to other branches of government, Professor Katrina Fischer Kuh argues that courts possess democratic legitimacy—and indeed a constitutional obligation—to grapple with climate change litigation because of "their institutional capacity to weigh intergenerational harms and responsibly assess scientific claims."[68]

While courts have not recognized an alternative path to address climate change through federal common law, some are beginning to issue holdings with potential to slow the United States' contribution to climate change. The legal framework underpinning these holdings is not federal common law, but rather NEPA, which some courts are interpreting with renewed vigor. Using the Tenth

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Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc., No. 19-01330, 3 (Nov. 18, 2019) (arguing that the court should reverse the district court's remand of the case to state court because the case "threatens to interfere with longstanding federal policies over matters of uniquely national importance").

63. In addition to the political question doctrine, many courts have relied on the doctrines of standing, displacement, or preemption "to avoid reaching the merits of common law and constitutional claims" related to climate change harms. *See* Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L.Q. 731–32 (2020). Professor Kuh posits that these decisions "reveal the judiciary's deep unease about its role in developing a societal response to climate change." *Id.* at 732, 734.

64. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 871 (N.D. Cal. 2009) (citing Corrie v. Caterpillar, 503 F.3d 974, 980 (9th Cir. 2007)).

65. *Id.* at 883.

66. The district court judge acknowledged that while the complaint raised "very real" dangers, climate change "deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case" and accordingly that "courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches." 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018).

67. 217 F. Supp. 3d 1224, 1235 (D. Or. 2016). The district court rejected this argument. *Id.* at 1241–42. Yet, on January 17, 2020, the Ninth Circuit ordered the case dismissed for lack of standing, in part because the plaintiffs did not clearly establish the redressability of the challenged harm. *See* Juliana v. United States, 947 F.3d 1159, 1171, 1175 (9th Cir. 2020). Judge Hurwitz expressed sympathy with the plaintiffs' claims but wrote that "[r]eluctantly," the court lacked the constitutional power to issue the requested relief and that "the plaintiffs' impressive case for redress must be presented to the political branches of government." *See id.* at 1164.

68. Kuh, *supra* note 63, at 731, 734.

Circuit as a case study, this Note analyzes this alternative path for the judiciary to address the executive branch's failure to seriously consider climate change.[69]

II. THE LEGAL CONTEXT FOR THE TENTH CIRCUIT TREND

NEPA is "the basic national charter for protection of the environment."[70] Under NEPA, federal agencies must prepare statements for "major federal actions significantly affecting the quality of the human environment" that describe the actions' impacts and alternatives.[71]

CEQ regulations provide detailed guidelines for NEPA analysis. Agencies must first prepare Environmental Assessments (EAs) of their proposed actions.[72] If an agency determines, based on the EA, that there will be no significant environmental impacts from its proposed action, it may issue a Finding of No Significant Impact (FONSI) and proceed.[73] Otherwise, it must prepare an Environmental Impact Statement (EIS).[74] An EIS must include analysis of a proposed action's direct impacts, reasonably foreseeable indirect impacts, and cumulative impacts over time or in conjunction with other actions.[75] The EIS must also consider alternative actions, including a "no action alternative."[76]

As NEPA does not provide an independent cause of action to bring suit, the Administrative Procedure Act (APA) enables courts to review the cases

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69. It is important to note that this alternative pathway for courts to address climate change through NEPA provides narrower relief than that requested in the cases discussed above, in which plaintiffs seek broad relief. In *City of Oakland*, the plaintiffs seek monetary relief from defendant fossil fuel companies to cover the anticipated harms from climate change within their jurisdictions, including the construction of seawalls and other infrastructure. *See* City of Oakland v. B.P., P.L.C., 325 F. Supp. 3d 1017, 1021–22 (N.D. Cal. 2018). The *Juliana* plaintiffs seek declaratory and injunctive relief, including an order to federal agencies to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2 so as to stabilize the climate system . . ." *See Juliana*, 217 F. Supp. 3d at 1239. In contrast, the cases described below generally seek to have federal agency actions vacated and projects paused until litigation and NEPA analysis are complete.

70. 40 C.F.R. § 1500.1 (1978).

71. 42 U.S.C. §§ 4332(C)(i)–(iii) (1970). NEPA also established the Council on Environmental Quality (CEQ) to promulgate regulations to implement NEPA's goals. *Id.* § 4342.

72. Unless they decide to begin directly with a more detailed EIS. 40 C.F.R. § 1501.4 (2012).

73. *Id.*

74. *Id.*

75. 40 C.F.R. § 1508.25 (1978).

> "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."

Id. § 1508.7. Direct effects "are caused by the action and occur at the same time and place." *Id.* § 1508.8. Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* They "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." *Id.*

76. *Id.* § 1508.25.

discussed in this Note.[77] The APA provides judicial review for those who "suffer[] legal wrong because of agency action."[78] Under the APA, courts must "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[79]

III. THE PROMISING TREND IN THE TENTH CIRCUIT

The country's federal public lands set the stage for a contentious battle over fossil fuel extraction and climate change impacts. BLM manages more than 700 million acres of "federal subsurface mineral estate," in addition to 244.4 million surface acres of public lands.[80] Ninety percent of these lands are open to oil and natural gas extraction and development.[81] The oil and gas industry currently leases thirty-six million acres of public lands.[82] In this context, NEPA provides the potential to slow the Trump Administration's blatant pursuit of "energy dominance."[83]

In the Tenth Circuit and across the country, courts have begun to intervene into this aggressive pursuit of fossil fuel development by robustly enforcing NEPA requirements.[84] A wide variety of actions by President Trump, BLM, and other executive agencies have been challenged in court since the start of his presidency. These challenged actions include many proposed rollbacks of environmental regulations.[85] A comprehensive survey of each challenged Trump

77. NEPA does not "provide a private right of action." Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F 3d 831, 839 (10th Cir. 2019) (citing Utah Envtl. Cong. v. Russell, 518 F.3d 817, 823 (10th Cir. 2008)). "Citizens who believe that a Federal agency's actions violate NEPA may seek judicial review (after any required administrative appeals) in Federal court under the Administrati[ve] Procedure[] Act." Council on Envtl. Quality, *A Citizen's Guide to the NEPA Having Your Voice Heard*, EXEC. OFFICE OF PRESIDENT (2007), https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf.

78. 5 U.S.C. § 702 (1966).

79. *Id.* § 706(2)(A).

80. U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., PUBLIC LANDS STATISTICS 2018 1 (2018), *available at* https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2018.pdf.

81. *The Oil and Gas Leasing Process on U.S. Public Lands*, CTR. FOR W. PRIORITIES, https://westernpriorities.org/issues/drilling-on-public-lands/ (last visited Oct. 12, 2019). The other 10 percent of public lands BLM manages is reserved for recreational, conservation, and wildlife purposes. *Id.*

82. However, only 12.6 million of the 36 million acres of public lands currently leased to oil and gas developers, or 35 percent, are currently under production. *Open for Business (and not much else) Analysis Shows Oil and Gas Leasing Out of Whack on BLM Lands*, WILDERNESS SOC'Y, https://www.wilderness.org/articles/article/open-business-and-not-much-else-analysis-shows-oil-and-gas-leasing-out-whack-blm-lands (last visited Oct. 12, 2019).

83. *See Remarks by President Trump at the Unleashing American Energy Event*, *supra* note 27.

84. *See* King, *supra* note 31; Rider & Livesay, *supra* note 28.

85. *See, e.g.*, California v. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1127 (N.D. Cal. 2017) (holding that BLM violated the APA by postponing compliance dates for parts of the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule after the rule's effective date); Sierra Club v. Pruitt, 293 F. Supp. 3d 1050, 1061 (N.D. Cal. 2018) (finding the EPA's delay in implementing formaldehyde emissions standards unlawful); Pineros y Campesinos Unidos del Noroeste v. Pruitt, 293 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018) (declaring that EPA violated the APA by delaying a rule regarding pesticide certification and use without providing for notice and comment); Clean Air Council v. Pruitt, 862 F.3d 1, 18 (D.C. Cir. 2017) (finding EPA's stay of portions of a rule establishing standards for fugitive emissions of methane and other pollutants unlawful under the CAA); Air All. Houston v. EPA, 906 F.3d

administration action is beyond the scope of this Note.[86] Instead, it will focus on NEPA challenges in Tenth Circuit courts to BLM actions related to fossil fuel development.

A. Diné Citizens*: The Tenth Circuit's Latest Example of This Trend*

Diné Citizens is the most recent case in which the Tenth Circuit held that BLM failed to comply with NEPA when approving fossil fuel development projects, in this instance by failing to consider cumulative water impacts.[87] Plaintiffs, a group of organizations representing Native American and environmental interests,[88] filed a petition for review under the APA, alleging BLM and other defendants violated the National Historic Preservation Act (NHPA) and NEPA.[89] They challenged BLM's approval of more than 130 applications for permits to drill (APDs) in the Mancos Shale region of New Mexico.[90]

The facts of the controversy span nearly two decades. In its 2003 final EIS, BLM analyzed the cumulative impacts of 9,942 new oil and gas wells predicted in the San Juan Basin within twenty years, focusing mostly on conventional vertical wells.[91] As technological advancements led to an increased interest in hydraulic fracturing ("fracking"), BLM began approving many APDs in the Mancos Shale area after completing EAs of each proposed well.[92] The agency initiated a new reasonably foreseeable development scenario (RFDS) in 2014, which predicted 3,960 new wells, mostly drilled through horizontal drilling and fracking.[93]

1049, 1069 (D.C. Cir. 2018) (vacating EPA's delay of the Chemical Disasters Rule); Sw. Elec. Power Co. v. EPA, 920 F.3d 999, 1032 (5th Cir. 2019) (holding EPA acted arbitrarily and capriciously by setting outdated standards for technology limits for legacy wastewater). *See also* Adam Gustafson, *Environmental Litigation in the Trump Administration The First Two Years*, AM. BAR ASSOC. (Mar. 8, 2019), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/march-april-2019/environmental-litigation/.

86. For more information on lawsuits against the Trump administration, *see* Fred Barbash et al., *Federal Courts Have Ruled Against Trump Administration Policies at Least 70 Times,* WASH. POST, https://www.washingtonpost.com/graphics/2019/politics/trump-overruled/ (last updated Apr. 26, 2019).

87. Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 859 (10th Cir. 2019).

88. The plaintiff-appellants include the Diné Citizens Against Ruining Our Environment, San Juan Citizens' Alliance, WildEarth Guardians, and Natural Resources Defense Council. Diné Citizens Against Ruining Our Env't v. Jewell, 2015 WL 6393843 (D.N.M. 2015).

89. The other defendants were the Director of BLM and Secretary of the Interior. *Id.* at 838.

90. *Id.*

91. *Id.* at 837–38.

92. *Id.*

93. *Id.* at 837. The Tenth Circuit explained that fracking uses high pressure to pump fluids into geologic formations to "create[] or enlarge[] fractures from which oil and gas can flow more freely." *Id.* It noted that horizontal drilling is a "relatively new" technique that "may have greater environmental impacts than vertical drilling and older fracturing techniques." *Id.* (citing Diné Citizens Against Ruining Our Environment v. Jewell, 839 F.3d 1276, 1283 (10th Cir. 2016)). Referencing previous Tenth Circuit precedent, the court explained that "[a] horizontally drilled well starts as a vertical or directional well, but then curves and becomes horizontal, or nearly so, allowing the wellbore [i.e., drilled hole] to follow within

After denying the plaintiffs' preliminary injunction to block additional permit approvals during the litigation,[94] the district court held that BLM had not violated the NHPA or NEPA.[95] On appeal, the Tenth Circuit considered whether BLM had violated the NHPA by not analyzing indirect and cumulative impacts on cultural sites of more than 300 challenged APDs[96] and whether BLM violated NEPA by not analyzing the APDs' cumulative impacts on environmental resources.[97] The plaintiffs argued that BLM violated NEPA by tiering its EAs for the challenged APDs to the 2003 EIS, as the environmental impacts from the horizontal wells were different from and greater than those of the predominantly vertical wells the 2003 EIS considered.[98]

The Tenth Circuit affirmed in part, reversed in part, and remanded to the district court with orders to vacate and remand five EAs to BLM for additional NEPA analysis.[99] The court began its analysis of the merits by noting the "dramatic insufficiency of the record" for most challenged actions.[100] It affirmed the district court's finding that the plaintiffs had standing[101] and its dismissal of

a rock stratum for significant distances and thus greatly increase the volume of a reservoir opened by the wellbore." *Id.* (quoting Wyoming v. Zinke, 871 F 3d 1133, 1137 (10th Cir. 2017).

94. Diné Citizens Against Ruining Our Env't v. Jewell, 2015 WL 6393843 (D.N.M. 2015). The Tenth Circuit affirmed this decision in Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276, 1285 (10th Cir. 2016).

95. Diné Citizens Against Ruining Our Env't v. Jewell, 312 F. Supp. 3d 1031, 1043, 1092, 1099 (D.N.M. 2018).

96. The number of challenged APDs increased from 120 to over 300 throughout the course of the litigation in the district court. Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 838 (10th Cir. 2019). The appellants argued before the Tenth Circuit that BLM violated NHPA in three ways. *Id.* at 845. First, they contended that BLM arbitrarily defined the relevant area without considering indirect effects on certain cultural sites. *Id.* Second, they argued that BLM did not consider the cumulative effects of Mancos Shale development on cultural and historic properties. *Id.* at 846. Third, they argued that, because the issues at hand were complex, BLM failed to consult with the State Historic Preservation Office as required by the 2014 Protocol. *Id.* The Tenth Circuit rejected each argument. *Id.* at 846–49. Further discussion of the NHPA claim is beyond the scope of this Note.

97. *Id.* at 838–39.

98. *Id.* at 850. Tiering refers to linking a site-specific EA to a broader EIS and thus "incorporating by reference the general discussions" of the larger EIS while "concentrating solely on the issues specific" to the EA in question. *See* 40 C.F.R. § 1508.28 (1978). The Tenth Circuit explained that a site-specific EA can still result in a FONSI if it will have significant environmental effects as long as the broader EIS it is tiered to "fully analyzed those significant effects." *Diné Citizens*, 923 F.3d at 831. However, the plaintiffs argued that BLM should not have tiered the site-specific EAs for the horizontal wells to the 2003 EIS as it "did not fully analyze" the impacts of horizontal wells but rather focused on the impacts of vertical wells. *Id.* at 850.

99. *Id.* at 836.

100. *Id.* at 844. The court lamented that while the plaintiffs sought reversal of more than 300 actions, they only supplied a complete record of BLM's decision making for a few of these actions. *Id.* It explained the agency documents it would need to evaluate each individual NHPA and NEPA claim and that one or more of these documents was missing, or improperly excerpted, for most claims. *Id.* at 844–45. This lack of information in the record left the court "unable to evaluate the sufficiency of BLM's NHPA and NEPA analyses for the vast majority of the challenged actions" and constrained it to reviewing only one set of challenged APDs for the NHPA claim and six contested EAs for the NEPA claim. *Id.* at 844.

101. *Id.* at 840.

the NHPA claim.[102] For the NEPA claim, the Tenth Circuit affirmed for the majority of the agency actions at issue, but reversed the district court on five challenged EAs.[103] The Tenth Circuit held that all 3,960 horizontal wells in the Mancos Shale region were reasonably foreseeable given the 2014 RFDS and that NEPA required BLM to consider the cumulative water resource impacts of all of the wells in each EA.[104] Because the cumulative water impacts of the 3,960 wells predicted in 2014 were greater than those considered in the 2003 EIS,[105] BLM's subsequent FONSIs and issuance of APDs were arbitrary and capricious, in violation of NEPA.[106] Due to lack of information in the record, the court was unable to consider the plaintiffs' argument that BLM also failed to analyze the cumulative air quality impacts of the 3,960 horizontal wells, which they claimed would exceed the amounts of air pollution considered in the 2003 EIS.[107]

While the court was unable to consider the cumulative air quality impacts of the contested horizontal wells, its reasoning on cumulative water impacts has potential to apply to climate change impacts of other fossil fuel development projects. *Diné Citizens* indicates that the Tenth Circuit is carefully watching for any attempts by BLM to circumvent NEPA requirements when approving fossil fuel development projects. The court's reasoning can likely be extended to agencies' insufficient analyses of cumulative GHG emissions in other projects. At the very least, the case suggests that the Tenth Circuit will ensure that agencies complete comprehensive NEPA analysis of the relevant environmental impacts of a fossil fuel development project, whether the impacts relate to water use, local air pollution, or GHG emissions. Fossil fuel development projects contribute to climate change as the extracted fossil fuel products create GHG emissions when burned.[108] Thus, even if the Tenth Circuit's reasoning is limited to consideration of a fossil fuel project's cumulative water impacts, *Diné Citizens* is helpful precedent for those seeking to slow or limit fossil fuel development projects by challenging failure to comply with NEPA.

B. Diné Citizens *Is Part of a Larger Trend in the Tenth Circuit*

Diné Citizens is not an outlier in the Tenth Circuit. The Tenth Circuit and several district courts within its boundaries have held that BLM violated NEPA in a variety of ways while approving fossil fuel development projects since

102. *Id.* at 850.
103. *Id.* at 852.
104. *Id.* at 854.
105. *Id.* at 856–57.
106. *Id.* at 850–51.
107. *Id.* at 854.
108. *See* Christina Nunez, *Fossil Fuels, Explained*, NAT'L GEOGRAPHIC (Apr. 2, 2019), https://www.nationalgeographic.com/environment/energy/reference/fossil-fuels/.

President Trump took office in early 2017. Some courts in other circuits have also issued similar holdings.[109]

The Tenth Circuit has made it clear that BLM must properly consider alternatives and cannot support its choice among alternatives with irrational assumptions. In *WildEarth Guardians v. Bureau of Land Management*, the Tenth Circuit held that BLM's choice between two alternatives was unlawful.[110] BLM's assumption—that approving four coal leases in Wyoming's Powder River Basin would not change the country's overall GHG emissions—was unsupported by the record and illogical.[111] BLM had not proven this assumption with anything besides "its own unsupported statements,"[112] and one of the main sources BLM used to support its choice between alternatives contradicted the assumption.[113] Yet, the court noted that even if the record had supported the assumption, it would still find it arbitrary and capricious because "the assumption itself is irrational (i.e., contrary to basic supply and demand principles.)"[114] Similarly, in *High Country Conservation Advocates v. U.S. Forest Service* (*High Country*), the Tenth Circuit found that the U.S. Forest Service (USFS) violated NEPA by failing to consider a reasonable alternative regarding road construction related to coal mining.[115] USFS adopted the Colorado Roadless Rule in 2012, which prohibited the construction of roads in certain areas but made an exception for the North Fork Coal Mining Area—the "North Fork Exception."[116] The

109. *See, e.g.*, WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41, 51 (D.D.C. 2019) (holding that "BLM did not sufficiently consider climate change" in its decision to lease 300,000 acres of public lands in Wyoming for oil and gas development); Citizens for Clean Energy v. Dep't of Interior, 384 F. Supp. 3d 1264, 1283 (D. Mont. 2019) (holding that DOI's lifting of a moratorium on coal leasing was subject to NEPA, that its decision not to undertake NEPA review was arbitrary and capricious, and that DOI must comply with NEPA requirements); WildEarth Guardians v. Zinke, 2019 WL 2404860 (D. Mont. 2019) (finding DOI violated NEPA when approving an expanded coal mining plan by insufficiently considering indirect effects of coal transportation and non-GHG effects of coal combustion and by arbitrarily choosing not to quantify costs of GHG emissions); W. Org. of Res. Councils v. Bureau of Land Mgmt., 2018 U.S. Dist. LEXIS 49635 (D. Mont. 2018) (holding that BLM failed to consider reasonable alternatives or sufficiently analyze indirect climate change impacts of resource management plans enabling coal development, and used an arbitrary time period for measuring carbon emissions, but sufficiently considered cumulative climate change impacts); Indigenous Envtl. Network v. State Dep't, 347 F. Supp. 3d 561, 591 (D. Mont. 2018) (finding some aspects of the State Department's decision to allow construction of the Keystone XL Pipeline violated NEPA, the APA, and the Endangered Species Act).

110. 870 F.3d 1222, 1233–34, 1236 (10th Cir. 2017). In its draft EIS, BLM concluded that its preferred action to approve the leases would not contribute further to the country's total carbon dioxide emissions than the no-action alternative, because if it did not approve the leases, "the same amount of coal would be sourced from elsewhere." *Id.* at 1228. BLM acknowledged that while cost is a factor, its leases would not have any effect on coal prices or demand and assumed that demand would remain static even if supply were reduced. *Id.* at 1228–29.

111. *Id.*

112. *Id.* at 1234.

113. *Id.*

114. *Id.* at 1236.

115. High Country Conservation Advocates v. U.S. Forest Serv., 951 F.3d 1217, 1220 (10th Cir. 2020).

116. *Id.* at 1219. A previous district court had vacated the North Fork Exception after finding NEPA and APA violations. *Id.* at 1219–20. USFS then readopted the exception and BLM and USFS granted the

Colorado district court had upheld BLM's decisions to approve expanded coal leases in an area governed by USFS' North Fork Exception,[117] finding that the agencies did not violate NEPA by declining to consider two proposed alternatives.[118] The Tenth Circuit disagreed.[119] While it agreed that NEPA did not require the agencies to consider the plaintiffs' proposed methane flaring alternative for the coal production, it held that USFS violated NEPA by not studying a proposed alternative to the North Fork Exception governing road construction.[120] The court found the decision at issue was not severable and thus instructed the district court to vacate the full North Fork Exception to the road rule on remand.[121]

District courts have followed suit by faulting BLM for failing to properly consider alternatives. In *Wilderness Workshop v. Bureau of Land Management*, the District Court for the District of Colorado held that BLM failed to consider reasonable alternatives to its decision to open public lands for oil and gas leases.[122] The plaintiffs alleged BLM violated NEPA by not considering any alternatives that would "meaningfully limit oil and gas leasing" in the area.[123] BLM argued it was not required to consider such alternatives as there was no real difference between opening areas with low development potential to leasing and not doing so, since so few of these areas would likely be developed.[124] The court was not convinced.[125]

District courts within the Tenth Circuit have also rejected BLM's attempts to avoid considering the indirect impacts of its proposed actions. The court in *Wilderness Workshop* also held that BLM violated NEPA by insufficiently considering the reasonably foreseeable indirect impacts of oil and gas combustion from its decision to lease public lands and that BLM must quantify these indirect effects on GHG emissions.[126] In *Citizens for a Healthy Community v. Bureau of Land Management*, the same district court held that BLM and USFS

coal company's lease modification requests after completing a Supplemental Final EIS. *Id.* at 1220. As the controversy began in 2012, far before President Trump took office, the agencies' actions were not necessarily driven by his "energy dominance" agenda. However, the Tenth Circuit's reasoning may be influenced by the administration's aggressive pursuit of fossil fuel development and the case will nonetheless provide useful precedent for those seeking to challenge Trump administration decisions to enable fossil fuel development.

117. High Country Conservation Advocates v. U.S. Forest Service, 333 F. Supp. 3d 1107, 1113 (D. Colo. 2018).

118. *Id.* at 1123, 1126–27. The court also noted that agencies are "not required to consider an unlimited number of alternatives." *Id.* at 1120–21.

119. *High Country Conservation Advocates*, 951 F.3d at 1220.

120. *Id.*

121. *Id.* at 22.

122. 342 F. Supp. 3d 1145, 1167 (D. Colo. 2018).

123. *Id.* at 1164.

124. *Id.* at 1166.

125. *Id.*

126. *Id.* at 1167. However, in this case the court found BLM had sufficiently considered the cumulative impacts of its actions on climate change and appropriately considered methane emissions and health effects. *Id.* at 1158, 1161–62, 1164.

had not adequately considered the foreseeable indirect impacts of oil and gas combustion related to leasing public lands in Colorado for drilling.[127] The court rejected the agencies' argument that it was too late for analysis of indirect impacts to be useful, as such reasoning "could theoretically reward agencies for skirting NEPA requirements in prior stages of oil and gas development, which does not align with the informed decision-making goals of NEPA."[128] Similarly, in *San Juan Citizens Alliance v. Bureau of Land Management*, the District Court for the District of New Mexico held that BLM and USFS failed to sufficiently consider the indirect impacts on GHG emissions and water quantity from approving oil and gas leases in the Santa Fe National Forest.[129] Although it would obtain more information later, BLM had enough information at the time to analyze indirect water quantity impacts and it failed to do so.[130]

These cases, along with *Diné Citizens*, represent a promising trend. The courts are closely watching for BLM's attempts to skirt NEPA analysis when enabling fossil fuel development.

IV. EXPLAINING THE TREND

There are several possible explanations for this trend. Perhaps the Tenth Circuit Court of Appeals and its associated district courts are simply relying on precedent. Alternatively, the political ideology of judges issuing each ruling might describe it. This Part examines each of these possibilities in turn before describing the five factors that explain the trend.

A. Is This Trend Simply a Product of Tenth Circuit Precedent?

Courts in the Tenth Circuit are not going out on a whole new limb by recognizing BLM's NEPA violations. They are applying Supreme Court and Tenth Circuit precedent, but they seem to be doing so in a new light and paying closer attention to BLM's attempts to avoid NEPA.

This trend does not represent an abrupt change of course to suddenly require adherence to NEPA, as courts have long held agencies to account for ignoring NEPA's requirements. The Supreme Court and Tenth Circuit have held that NEPA requires agencies to take a "hard look" at the environmental consequences

127. Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1233, 1237 (D. Colo. 2019). Thus, the agencies had acted arbitrarily and capriciously and violated NEPA. *Id.* at 1237.

128. *Id.* However, the court found that BLM and USFS sufficiently considered alternatives, cumulative climate change impacts, water resource and human health impacts, cumulative air quality impacts, and direct and cumulative water quantity impacts. *Id.* at 1235, 1239, 1242, 1244–45.

129. 326 F. Supp. 3d 1227, 1244, 1254 (D.N.M. 2018). However, BLM had sufficiently considered water quality impacts and cumulative air quality effects. *Id.* at 1255, 1252. BLM's failure to estimate the amount of GHG emissions that downstream combustion of fossil fuel resources developed under its action would produce was arbitrary. *Id.* at 1244.

130. *Id.* at 1254. The court set aside the FONSIs and issuance of the leases and remanded to BLM for further NEPA analysis. *Id.* at 1256.

of and alternatives to their proposed actions.[131] As the Tenth Circuit explained in *WildEarth Guardians*, referencing longstanding Tenth Circuit precedent, an agency's failure to take such a "'hard look' at the environmental effects of the alternatives before it" renders the agency's EIS "arbitrary and capricious" under the APA.[132] In *Diné Citizens*, the court cited recent Tenth Circuit precedent to describe the "twin aims" of NEPA: obliging agencies to (1) consider all significant environmental impacts of their actions and (2) inform the public of such impacts.[133] The Tenth Circuit had previously explained that failure to compare substantive information about alternatives would "greatly degrade[]" an agency's ability to make informed decisions and facilitate public participation.[134] The *Diné Citizens* court also cited its own precedent explaining that an agency must consider cumulative impacts in its EA.[135] Thus, *Diné Citizens* and its related cases rest on a clear line of precedent that has long required agencies to follow NEPA's statutory requirements in service of its broader aims.

However, the trend of recent rulings in the Tenth Circuit Court of Appeals and several of its district courts suggests that these courts are going a step further by taking a less deferential approach than previous courts to agency action. The Tenth Circuit has previously described the APA's "arbitrary and capricious" standard as "very deferential" to the agency.[136] In *Diné Citizens*, the Tenth Circuit cited cases explaining the "presumption of validity" agencies enjoy in NEPA challenges under the APA and that deference to agencies is particularly strong for decisions concerning the agency's area of expertise.[137] Again citing its own precedent, the Tenth Circuit outlined the "rule of reason standard" its courts apply to gauge whether alleged NEPA violations "are merely flyspecks, or are significant enough to defeat" NEPA's dual goals.[138] In *WildEarth Guardians*, the Tenth Circuit described the rule of reason standard as "essentially an abuse of discretion standard,"[139] which only needs "'a reasonable, good faith,

131. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); New Mexico ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 704 (10th. Cir. 2009); Biodiversity Conservation All. v. U.S. Forest Serv., 765 F.3d 1264, 1267 (10th Cir. 2014); All Indian Pueblo Council v. United States, 975 F.2d 1437, 1445 (10th Cir. 1992).

132. WildEarth Guardians v. Bureau of Land Mgmt., 870 F.3d 1222, 1233 (10th Cir. 2017) (citing *All Indian Pueblo Council*, 975 F.2d at 1445).

133. Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 839 (10th Cir. 2019) (citing Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 711 (10th Cir. 2010)).

134. *Richardson*, 565 F.3d at 708.

135. *Diné Citizens*, 923 F.3d at 851 (citing WildEarth Guardians v. U.S. Fish & Wildlife Serv., 784 F.3d 677, 690 (10th Cir. 2015)).

136. *See* Kobach v. U.S. Election Assistance Comm'n, 772 F.3d 1183, 1197 (10th Cir. 2014).

137. *Diné Citizens*, 923 F.3d at 839 (citing Citizens' Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169, 1176 (10th Cir. 2008); Morris v. U.S. Nuclear Reg. Comm'n, 598 F.3d 677, 691 (10th Cir. 2010)).

138. *Diné Citizens*, 923 F.3d at 852 (quoting Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1163 (10th Cir. 2002)).

139. WildEarth Guardians v. Bureau of Land Mgmt., 870 F.3d 1222, 1233 (10th Cir. 2017) (citing *Utahns for Better Transp.*, 305 F.3d at 1163).

objective presentation of' the topics NEPA requires an EIS to cover"[140] but also requires agencies to state "plausible" reasons for rejecting alternatives.[141] The Tenth Circuit most recently reiterated this deferential standard in *High Country*, explaining that agency actions challenged as arbitrary and capricious enjoy a "presumption of validity" and that petitioners have the burden of proof.[142] It "recognize[d] that agencies must engage in line-drawing and are due deference in that exercise" when determining which alternatives to study.[143] But despite their reiteration of these highly deferential standards, several courts in the Tenth Circuit have recently held that BLM and other executive agencies violated NEPA by not properly considering the environmental impacts of the fossil fuel development projects they enabled.[144] Perhaps the Trump administration's pursuit of rampant fossil fuel development has emboldened the courts to be less deferential to executive agencies' NEPA review. No matter the reason, the repeated reversal of BLM decision making under NEPA, despite the deferential standard of review set out by precedent, suggests this trend cannot be explained by precedent alone.

Furthermore, the Tenth Circuit has specifically signaled that it does not consider climate change to be an area where agencies deserve particular deference. In *WildEarth Guardians*, the court determined that BLM's carbon dioxide emissions analysis in the instant case was not entitled to deference because it "d[id] not involve 'the frontiers of science.'"[145] Unlike the nuclear waste storage determination at issue in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, in which the Supreme Court deferred to the Nuclear Regulatory Commission's decision as it involved an issue in the commission's "special expertise, at the frontiers of science," the Tenth Circuit rejected the notion that climate change, or the technology to model it, were similar scientific frontiers subject to special deference.[146] Thus, the Tenth Circuit appears less

140. *Id.* (citing Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1522 (10th Cir. 1992) (quoting Johnston v. Davis, 698 F.2d 1088, 1091 (10th Cir. 1983)).

141. *Id.* (quoting All Indian Pueblo Council v. United States, 975 F.2d 1437, 1446 (10th Cir. 1992)).

142. High Country Conservation Advocates v. U.S. Forest Serv., 951 F.3d 1217, 1224 (10th Cir. 2020) (quoting Copar Pumice Co. v. Tidwell, 603 F.3d 780, 793 (10th Cir. 2010)). The Tenth Circuit also explained that it "will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned' but will not 'supply a reasoned basis for the agency's action that the agency itself has not given'" (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

143. *Id.* at 1233.

144. *See supra* notes 110–130 and accompanying text.

145. *Id.* at 1236, 1238.

146. The Supreme Court explained in *Baltimore Gas* that courts are especially deferential to agencies regarding matters of their "special expertise, at the frontiers of science." *Id.* at 1236, 1238 (citing Baltimore Gas & Electric Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 102–04 (1983)). The Tenth Circuit pointed out that BLM itself "acknowledged that climate change is a scientifically verified reality" and thus dismissed the agency's argument that it was entitled to greater deference. *Id.* at 1236–37. The court acknowledged that climate science had progressed since the time BLM performed its emissions analysis, but that it was not a "barely emergent knowledge and technology" and that climate modeling options existed that BLM could use. *Id.*

deferential to agency decisions than were previous courts reviewing NEPA analyses, especially when it comes to climate change.

The fact that these rulings rest on solid precedent demonstrates that district courts in the Tenth Circuit and the Court of Appeals itself are not reinventing the wheel when interpreting NEPA and CEQ guidelines. Yet, the cited precedent also suggests that Tenth Circuit courts may be taking a bolder step in finding NEPA violations by BLM even under the APA's deferential standard and the "rule of reason" standard for NEPA violations. Alternatively, it might suggest that the challenged agency actions are so egregious that they do not deserve deference even under such permissive standards.

B. Could It Be a Product of Judicial Ideology?

Predictable markers of judicial ideology cannot fully account for this trend. While some might hypothesize that the trend would fall along party lines, with Republican-appointed judges upholding President Trump's "energy dominance" agenda and Democratic-appointed judges requiring stricter consideration of environmental impacts, the cases discussed do not fit neatly within such a model. Using a simplified metric correlating judicial ideology with the party affiliation of the president who appointed each judge,[147] the analysis below demonstrates that presumed judicial ideology is not the reason for this trend.

The Tenth Circuit is considered one of the country's most moderate, and, in comparison to other circuits, its decisions are rarely overturned by the Supreme Court.[148] Unlike the Ninth Circuit, the Tenth Circuit is not known for being particularly liberal,[149] but it is also not considered a conservative stronghold like the Fifth Circuit.[150] Roughly half of the current Tenth Circuit judges were appointed by Republican presidents and half by Democratic presidents.[151]

147. For a detailed explanation "confirm[ing] conventional wisdom" about this link and finding that "Democratic judges indeed are more liberal on the bench than Republican counterparts," *see* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts A Meta-analysis*, 20 JUST. SYS. J. 219, 243 (1999). While the article often uses judges' personal party identifications, it affirmed that "investigations of the federal bench often look at the party of appointing presidents" to measure ideology. *Id.* at 222. Modern American presidents usually nominate federal judges who reflect their ideology. *Id.* at 242.

148. Dylan Matthews, *How the 9th Circuit Became Conservatives' Least Favorite Court*, VOX MEDIA (Jan. 10, 2018), https://www.vox.com/policy-and-politics/2018/1/10/16873718/ninth-circuit-court-appeals-liberal-conservative-trump-tweet.

149. While the Ninth Circuit has a reputation for being liberal, it also "has more ideological diversity than its critics give it credit for" and continues to evolve. *Id.*

150. The Fifth Circuit is "considered the country's most politically conservative" and is becoming even more so under President Trump's appointments. Emma Platoff, *Trump-appointed Judges Are Shifting the Country's Most Politically Conservative Circuit Court Further to the Right*, TEX. TRIBUNE (Aug. 30, 2018), https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative/.

151. U.S. Court of Appeals for Tenth Circuit, *Judges of the Tenth Circuit Court of Appeals*, www.ca10.uscourts.gov/judges (last visited Nov. 11, 2020).

The three Tenth Circuit Court of Appeals cases discussed in this Note were written by judges appointed by Democratic presidents, yet the Republican-appointed judges only dissented in one case. Judge Briscoe, appointed by Democratic President Bill Clinton,[152] wrote the *Diné Citizens* opinion, but neither Judge Holmes, appointed by Republican President George W. Bush,[153] nor Judge McKay, appointed by Democratic President Jimmy Carter,[154] dissented. Judge Briscoe also wrote the *WildEarth Guardians* opinion, but Judge Baldock, appointed by Republican President Ronald Reagan,[155] concurred rather than dissenting.[156] Judge Lucero, appointed by President Clinton,[157] wrote the *High Country* opinion, although in that case Judge Kelly, appointed by President Bush,[158] dissented in part.[159] Thus, while judicial ideology might account for the fact that a Democratic-appointed circuit judge wrote all three opinions and a Republican-appointed judge dissented in one case, the lack of strong protest from Republican-appointed judges in the two other cases implies there is more to the trend than judicial ideology.

In the district court cases discussed, the trend is even less explained by judicial ideology. Each of the three opinions striking down BLM's actions as violations of NEPA were decided by Republican-appointed judges. The Colorado district's Judge Babcock, appointed by President Reagan,[160] wrote both the *Wilderness Workshop* and *Citizens for a Healthy Community* opinions. Similarly, Judge Armijo, a Bush appointee, decided *San Juan Citizens Alliance*.[161] The case that does not fit as neatly in the trend, *Southern Utah Wilderness Alliance v. Department of Interior*, discussed below in Subpart IV.D,

152. U.S. Court of Appeals for Tenth Circuit, *Judge Mary Beck Briscoe*, https://www.ca10.uscourts.gov/judges/chief-judge-mary-beck-briscoe (last visited Nov. 8, 2019).

153. U.S. Court of Appeals for Tenth Circuit, *Judge Jerome A. Holmes*, https://www.ca10.uscourts.gov/judges/judge-jerome-holmes (last visited Nov. 8, 2019).

154. U.S. Court of Appeals for Tenth Circuit, *Senior Judge Monroe G. McKay*, https://www.ca10.uscourts.gov/judges/senior-judge-monroe-g-mckay (last visited Nov. 8, 2019).

155. U.S. Court of Appeals for Tenth Circuit, *Senior Judge Bobby R. Baldock*, https://www.ca10.uscourts. gov/judges/senior-judge-bobby-r-baldock (last visited Nov. 8, 2019).

156. Judge Baldock's concurrence agreed with the majority's reasoning about the irrational nature of BLM's economic assumption, but took issue with the discussion of climate science, given that the court was considering an "economic" question. WildEarth Guardians v. Bureau of Land Mgmt., 870 F.3d 1222, 1240–42 (10th Cir. 2017).

157. U.S. Court of Appeals for Tenth Circuit, *Judge Carlos F. Lucero*, https://www.ca10.uscourts.gov/judges/judge-carlos-f-lucero (last visited Mar. 17, 2020).

158. U.S. Court of Appeals for Tenth Circuit, *Senior Judge Paul J. Kelly, Jr.*, https://www.ca10.uscourts. gov/judges/judge-paul-j-kelly-jr (last visited Mar.n 17, 2020).

159. High Country Conservation Advocates v. U.S. Forest Serv., 951 F.3d 1219, 1240 (10th Cir. 2020).

160. Fed. Judicial Ctr., *Babcock, Lewis Thornton*, https://www.fjc.gov/history/judges/babcock-lewis-thornton (last visited Nov. 8, 2019).

161. Fed. Judicial Ctr., *Armijo, M. Christina*, https://www.fjc.gov/history/judges/armijo-m-christina (last visited Nov. 8, 2019).

was decided by a Democratic-appointed judge.[162] Thus, the district court cases are not predictable based on the party affiliation of the president appointing each judge, demonstrating that presumed judicial ideology alone cannot explain this trend in the Tenth Circuit.

C. Factors That Explain the Trend

Instead, five key factors stand out as reasons why courts in the Tenth Circuit are holding BLM accountable for its NEPA violations. The first three relate back to bedrock NEPA requirements outlined in the CEQ guidelines: courts are requiring agencies to properly consider (1) indirect impacts of, (2) cumulative impacts of, and (3) reasonable alternatives to their proposed actions. Factors four and five relate more broadly to NEPA's inherent purposes, as courts are watching closely for BLM's attempts to either (4) support its reasoning with illogical assumptions, or (5) subvert informed decision making.

These five factors suggest that while federal courts have thus far refrained from providing broad climate change relief, there are limits to how far the executive branch can pursue its "energy dominance" agenda without considering climate and other impacts—at least in the Tenth Circuit. This Subpart concludes by arguing that the factors accounting for this trend are in fact inherent parts of NEPA, which courts are interpreting to face the twin threats of climate change and the Trump administration. Ultimately, the factors show the continued importance of NEPA as a tool for mitigating climate change in the face of forceful executive pursuit of fossil fuel development, despite the statute's lack of mitigation requirements.[163]

1. Factor One: Consideration of Indirect Impacts

First, courts are holding BLM accountable when it does not properly consider the indirect impacts of its proposed actions on GHG emissions and climate change. The District Court for the District of Colorado faulted BLM for failing to properly consider the indirect impacts of oil and gas combustion from its proposed actions in both *Wilderness Workshop*[164] and *Citizens for a Healthy Community*.[165] In *Wilderness Workshop*, BLM argued that its ability to assess the indirect impacts of its decision to lease public lands for oil and gas development was limited, in part because forecasting oil and gas production was speculative, and thus only performed a qualitative analysis of such impacts.[166]

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162. Judge Jill N. Parrish, appointed by Democratic President Barack Obama, decided *Southern Utah Wilderness Alliance v. Dep't of Interior*. Fed. Judicial Ctr., *Parrish, Jill N.*, https://www.fjc.gov/history/judges/parrish-jill-n (last visited Nov. 8, 2019).

163. *See infra* note 231.

164. Wilderness Workshop v. Bureau of Land Mgmt., 342 F. Supp. 3d 1145, 1167 (D. Colo. 2018).

165. Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223 (D. Colo. 2019).

166. BLM also justified its qualitative analysis on the basis that natural gas production arising from its leases could reduce GHG emissions if it displaces coal and oil use, as gas produces lower GHG

The court held that BLM had sufficient data to project the GHG emissions from the combustion of these fuels and was required to quantify these reasonably foreseeable indirect effects.[167] The same court also held that BLM and USFS had insufficiently considered the foreseeable indirect effects of oil and gas combustion in *Citizens for a Healthy Community*.[168] There, the plaintiffs claimed BLM had done no analysis of these indirect impacts; the agencies responded that "available scientific models could not perform such precise calculations" and that they did not know which specific uses the fossil fuels would be put to, nor what their incremental effects on climate change would be.[169] The court rejected these arguments and held that the agencies must quantify and analyze these effects.[170] In both instances, the court told agencies that when they open public lands to fossil fuel development, their NEPA analyses must include indirect effects of burning the fossil fuels to be developed.

Similarly, although not discussed under the metric of indirect impacts, the Tenth Circuit held in *WildEarth Guardians* that BLM must properly consider the carbon dioxide emissions that would result from its proposed coal leases.[171] It pointed out that BLM's analysis of the carbon emissions that would result from its coal-leasing decision was "liberal (i.e., underestimates the effect on climate change)," and declined to defer to BLM on this analysis.[172] The court thus held BLM to account for the overall impact of its proposed action on GHG emissions, not just for the emissions from mining coal.

The Tenth Circuit and one of its district courts are requiring BLM to consider the indirect impacts of its fossil fuel enabling decisions on GHG emissions and thus climate change.

2. Factor Two: Consideration of Cumulative Impacts

Second, courts are stepping in to ensure that BLM properly assesses the cumulative impacts of its proposed actions. In *Diné Citizens*, the Tenth Circuit held BLM failed to consider the 3,960 reasonably foreseeable horizontal wells' cumulative impacts on water resources.[173] The court rejected BLM's attempt to only consider water impacts based on the 2003 EIS, as the 2014 RFDS showed that many more wells were anticipated and that the water impacts from the new wells were greater than those considered in the 2003 EIS.[174] BLM thus had to

emissions than coal and oil, and thus that "quantifying GHG emissions would be potentially misleading." *See Wilderness Workshop*, 342 F. Supp. at 1155.

167. *See id.* at 1156.

168. *See Citizens for a Healthy Cmty.*, 377 F. Supp. 3d at 1237.

169. *See id.* at 1236.

170. *See id.* at 1237.

171. The Tenth Circuit considered this issue under the framework of whether BLM's perfect substitution analysis supported its choice of alternatives. WildEarth Guardians v. Bureau of Land Mgmt., 870 F.3d 1222, 1234–36 (10th Cir. 2017).

172. *See id.* at 1236.

173. Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 859 (10th Cir. 2019).

174. *Id.* at 856–57.

update the information underpinning each site-specific EA[175] so that the cumulative impacts analysis truly considered all of the reasonably foreseeable development actions. The court was not able to determine whether BLM properly considered cumulative air quality impacts due to the lack of information in the record.[176] However, if the plaintiffs had demonstrated a similar flaw in BLM's analysis, the Tenth Circuit's reasoning might extend to cumulative air quality impacts.[177]

Two district court cases also rejected BLM's consideration of certain cumulative impacts. While the court in *Citizens for a Healthy Community* upheld the agencies' consideration of the cumulative impacts of climate change, air quality, and water quantity, it held the agencies violated NEPA by not sufficiently considering their leases' cumulative impacts on wildlife.[178] Because the agencies failed to "sufficiently explain the scope" for their cumulative impacts analysis regarding wildlife, the court required the agencies to "clarify the area [they] used" for this analysis.[179] If it turned out that the agencies only considered a portion of the relevant area, they were required to reconsider their decision and either sufficiently support it or expand the area of analysis.[180] The court in *San Juan Citizens Alliance* also held that BLM failed to consider its leases' cumulative impacts on climate change,[181] in part, by not weighing the indirect effects of GHG emissions.[182]

In several of the cases, however, the courts found BLM did sufficiently consider some cumulative impacts, including those on climate change,[183] air quality,[184] and water quantity.[185] Yet, the fact that cumulative impact analyses were carefully considered in each case, and that courts found NEPA violations when the agencies did not properly consider such impacts, shows the courts are paying close attention to ensure BLM properly considers cumulative impacts.

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175. *Id.* at 854.

176. *Id. See supra* note 100 for further discussion of the court's reasoning on the lack of information in the record.

177. While the Tenth Circuit did not explicitly state that it would extend its reasoning to BLM's cumulative air impact analysis, it noted that the numbers the plaintiffs provided for air quality impacts similarly "indicate that horizontal wells have a much greater environmental impact than do vertical wells." *Id.* at 854. However, because the record did not support the numbers plaintiffs provided about these air quality impacts or include the agency's full analysis of air pollution, the court was "unable to fully evaluate the [plaintiffs'] air pollution argument." *Id.*

178. Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1239, 1244–45, 1247 (D. Colo. 2019).

179. *Id.* at 1246.

180. *Id.*

181. San Juan Citizens Alliance v. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1248 (D.N.M. 2018).

182. *Id.* at 1249.

183. Wilderness Workshop v. Bureau of Land Mgmt., 342 F. Supp. 3d 1145, 1158 (D. Colo. 2018); *Citizens for a Healthy Cmty.*, 377 F. Supp. 3d at 1239.

184. *Citizens for a Healthy Cmty.*, 377 F. Supp. 3d at 1244; *San Juan Citizens Alliance,* 326 F. Supp. 3d at 1252.

185. *Citizens for a Healthy Cmty.*, 377 F. Supp. 3d at 1245.

3. Factor Three: Consideration of Alternatives

Third, these courts are rejecting BLM's disingenuous and incomplete consideration of alternatives. In *WildEarth Guardians*, the Tenth Circuit admonished BLM's failure to distinguish between its preferred alternative, approving the coal leases, and the no-action alternative.[186] In its draft EIS, BLM had compared its preferred alternative—to approve four coal leases to extend the production from two existing coal mines—with a "no action alternative in which none of the coal leases would be issued."[187] BLM determined that "there was no appreciable difference" between these two alternatives' impact on the country's overall GHG emissions, despite the fact that the two coal mines at issue represent 19.7 percent of annual domestic coal production and would not continue producing coal past their currently leased reserves unless the preferred action alternative was taken.[188] The court took issue with this faulty economic assumption and held that by relying on it, BLM "fail[ed] to adequately distinguish between these alternatives," which "defeated NEPA's purpose" to enable informed decision making and public comment.[189] It also stressed the importance of BLM properly supporting its choice between alternatives with sufficient data, as opposed to unsupported assumptions.[190]

The Tenth Circuit again stressed the importance of properly considering alternatives in *High Country*.[191] The court's holding centered on an alternative that the plaintiffs had requested USFS consider during notice and comment rulemaking, the "Pilot Knob Alternative," which would limit the areas open to road construction for coal mining.[192] USFS declined to evaluate this alternative and instead only analyzed three alternatives in detail: a no-action alternative, readopting the full North Fork Exception, or adopting the North Fork Exception with a different exclusion than the Pilot Knob Alternative.[193] Finding that the Pilot Knob Alternative was easily within USFS's statutory mandate and "would appear to fit within the stated project goals" by balancing conservation and development, the Tenth Circuit determined it was a reasonable alternative.[194] It rejected USFS's attempt to avoid studying this alternative, finding that the

186. WildEarth Guardians v. Bureau of Land Mgmt., 870 F 3d 1222, 1236–38 (10th Cir. 2017).

187. *See id.* at 1227.

188. BLM justified this conclusion with the rationale that "even if it did not approve the proposed leases, the same amount of coal would be sourced from elsewhere." *See id.* at 1227–28.

189. *Id.* at 1237.

190. *Id.* at 1235. The court pointed out that "BLM did not point to any information (other than its own unsupported statements) indicating that the national coal deficit of 230 million tons per year incurred under the no-action alternative could be easily filled from elsewhere, or at a comparable price." *Id.* at 1234. It found that BLM's economic assumption "f[ell] below the required level of data necessary to reasonably bolster the Bureau's choice of alternatives." *Id.*

191. High Country Conservation Advocates v. U.S. Forest Serv., 951 F.3d 1219, 1227–34 (10th Cir. 2020).

192. *Id.* at 1220–21.

193. *Id.* at 1222. After this analysis, the USFS selected the alternative of readopting the entire North Fork Exception. *Id.*

194. *Id.* at 1227–28.

agency's rationale was "based solely on the fact that the Pilot Knob Alternative would protect more land and provide access to fewer tons of coal than" the alternative it selected.[195] "This one-sided approach," the court reasoned, "conflicts with the agency's obligation under NEPA" to properly consider reasonable alternatives.[196] The court explained that an EIS will be deemed inadequate if "the agency omits an alternative but fails to explain why that alternative is not reasonable."[197] It further found that the fact that the proposed alternative was "significantly distinguishable" from the third alternative studied because it "would protect 2100 fewer areas—nearly 30% less land" while allowing access to more coal, affecting different coal resources,[198] and "result[ing] in significantly different environmental impacts."[199] Thus, the agency's decision not to study this alternative was arbitrary and capricious.[200] However, the court found reasonable the USFS and BLM decision to not study the plaintiffs' proposed methane flaring alternative regarding expanded coal leases.[201] It accepted the agencies' explanation that studying the proposed alternative would require detailed data and designs involving other agencies, as plaintiffs failed to demonstrate that the agencies had sufficient data for the analysis.[202]

Similarly, in *Wilderness Workshop*, the district court held that BLM failed to consider reasonable alternatives.[203] The plaintiffs argued that BLM violated NEPA by "omitting any option that would meaningfully limit oil and gas leasing and development" in the area in question.[204] BLM had done a "cursory analysis of a no leasing alternative," but explained that it was right not to further explore this alternative because it would not be "practically different" than the alternatives it considered.[205] The agency argued that most of the areas under consideration with high potential for oil and gases leasing were already leased, and the "low projected percentage of development" on other lands meant it did not need to consider an alternative where leasing was prohibited on low-potential and medium-potential lands.[206] The court explicitly rejected BLM's argument "that there is no substantive difference between an alternative that opens low and medium potential areas for leasing and one that does not," because the latter

195. *Id.* at 1228.

196. *Id.*

197. *Id.* at 1229. The court also failed to consider a rationale that USFS supplied in its briefs, finding it to be a "post-hoc rationalization" because it was not the basis of the agency's decision not to consider the alternative. *Id.* at 1230.

198. *Id.* at 1231–32.

199. *Id.* at 1232.

200. *Id.* at 1234.

201. *Id.* at 1223, 1235–36.

202. *Id.* at 1234–35.

203. Wilderness Workshop v. Bureau of Land Mgmt., 342 F. Supp. 3d 1145, 1167 (D. Colo. 2018).

204. *See id.* at 1164.

205. *See id.*

206. The plaintiffs argued that BLM should still have considered an alternative prohibiting leasing on low and medium-potential lands, so that other uses of such lands could be considered. *See id.* at 1165.

alternative could enable BLM to use the lands for other uses such as recreation and ecological preservation.[207]

In contrast, the same court found in *Citizens for a Healthy Community* that BLM had sufficiently considered alternatives to its proposed action.[208] The plaintiffs argued that BLM should have considered a phased development alternative that would cluster oil and gas development geographically and temporally in order to keep non-active areas open for wildlife and recreation purposes.[209] The court found that although the agencies "did not consider an alternative explicitly named 'phased development,'" they nonetheless considered "aspects of Plaintiffs' suggestions" by considering alternatives with time and space limitations and a "progressive development plan" factoring in sensitive wildlife habitats.[210] Thus, plaintiffs did not show that the alternative they proposed differed enough from those the agency considered to require specific consideration.[211]

Thus, the courts did not fault BLM's consideration of alternatives in every case. Courts do not always require agencies to consider plaintiffs' proposed alternatives, as *Citizens for a Healthy Community* shows. Nevertheless, the cases described, particularly *WildEarth Guardians*, demonstrate the courts' commitment to thorough consideration of reasonable alternatives.

4. Factor Four: Irrational Assumptions and Contradictions

Fourth, courts reject BLM's attempts to rely on irrational assumptions or contradictory arguments. In *WildEarth Guardians*, the Tenth Circuit lambasted BLM for basing its decision on an assumption that was both "irrational" and contradicted by one of the main sources the agency used to bolster its choice.[212] BLM had based its choice among alternatives on the assumption that approving the coal leases would not affect overall national GHG emissions, because if it did not approve the leases, "the same amount of coal would be sourced from elsewhere."[213] It also argued that its leasing decision would not affect coal prices or demand, assuming that demand would remain consistent even if the domestic coal supply were reduced according to the no-action alternative.[214] The Tenth Circuit disagreed, finding this assumption was irrational and "contradicted basic

207. *Id.* at 1166–67. In contrast, the court explained that under an alternative where low and medium-potential areas were open to leasing, "even if there is a minimal chance for development, it would detract from BLM designating that land for other uses." *See id.* at 1166.

208. Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1235 (D. Colo. 2019).

209. *See id.* at 1234.

210. *See id.* at 1235.

211. The court noted that the agencies "explored aspects of Plaintiffs' proposed alternative and provided sufficient explanation for why they did not explore other aspects of Plaintiffs' suggestions." *See id.* at 1235.

212. WildEarth Guardians v. Bureau of Land Mgmt., 870 F 3d 1222, 1234, 1236 (10th Cir. 2017).

213. *See id.* at 1228–29.

214. *See id.* at 1228–29.

economic principles."[215] Moreover, the assumption "was contradicted by one of the principal resources on which [BLM] relie[d]," as one of the agency's reports stated that increased coal prices would affect demand.[216] BLM acknowledged this fact, "counter to its entire argument," but argued that "overall increased demand for electricity" would outweigh the effect of rising coal prices on demand for coal.[217] The court rejected this argument, finding that BLM had "merely concluded" price would not affect demand, without properly considering it.[218]

Similarly, the Tenth Circuit rejected the agency's circular reasoning in *High Country*. The court took issue with USFS' rationale for not studying the proposed Pilot Knob Alternative because "[u]nder the agency's logic, every alternative except [the one it selected] could have been eliminated from detailed study merely because it forecloses long-term coal mining opportunities."[219] The Tenth Circuit reasoned in no uncertain terms that this rationale was arbitrary and capricious, finding that USFS "failed to provide a logically coherent explanation for its decision to eliminate the Pilot Knob Alternative."[220]

And likewise, in *Wilderness Workshop*, the district court critiqued BLM for trying to have it both ways, explaining that it violates the APA for an agency to use estimates to support part of its EIS "but then state that it is too speculative to forecast effects based on those very outputs."[221] BLM's claim that it was "merely too speculative" to estimate the indirect effects of oil and gas combustion was "belied by its own analysis" of such emissions.[222] The same district court, in *Citizens for a Healthy Community*, again pointed out the flaw in BLM's attempt to simultaneously make conflicting arguments based on the same information.[223]

This shows that courts recognize BLM's attempts to justify its decisions to enable further fossil fuel development with assumptions unsupported by available data on GHG emissions or with contradictions within its own arguments. It may be the most relevant factor for redressing the Trump administration's attempt to pursue fossil fuel development at all costs.

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215. *See id.* at 1236–38.

216. *See id.* at 1234. The court noted that this "report supports what one might intuitively assume: when coal carries a higher price, for whatever reason that may be, the nation burns less coal in favor of other sources." *Id.* at 1235.

217. *See id.*

218. *See id.*

219. High Country Conservation Advocates v. U.S. Forest Serv., 951 F. 3d 1217, 1228 (10th Cir. 2020).

220. *Id.* at 1228, 1233–34.

221. Wilderness Workshop v. Bureau of Land Mgmt., 342 F. Supp. 3d 1145, 1156 (D. Colo. 2018).

222. *Id.*

223. The court explained that "an agency cannot rely on production estimates while simultaneously claiming it would be too speculative to rely upon the predicted emissions from those same production estimates." Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1237 (D. Colo. 2019).

5. Factor Five: Preventing Informed Decision Making

Finally, the Tenth Circuit and the district courts within that circuit seem highly responsive to BLM's efforts to thwart NEPA's goal of enabling informed decision making. The courts have shown a willingness to reprimand BLM for rushing through decisions that are unsupported by the factual record without collecting the data needed to make an informed choice. In *WildEarth Guardians*, the Tenth Circuit explained that the fact that BLM's faulty assumption that increased coal prices would not affect demand lacked sufficient support in the record was itself enough to determine that BLM's actions were arbitrary and capricious.[224] BLM had no other information to prove its assumption "other than its own unsupported statements," which did not suffice to justify the decision.[225] Additionally, the district court in *Citizens for a Healthy Community* rejected BLM's argument that it was too late to consider the indirect impacts of its proposed action, as such reasoning might "reward agencies for skirting NEPA requirements," in conflict with the statute's goal of enabling informed decision making.[226] Furthermore, in *San Juan Citizens Alliance*, the district court reminded BLM that even though it would obtain more information about water impacts later on, it was still required to use the sufficient information available at the time to analyze the impacts.[227] These holdings demonstrate that the Tenth Circuit and several of its district courts are committed to ensuring agencies do not block the fundamental NEPA goal of enabling informed decisions based on sufficient information.

6. These Factors Demonstrate NEPA's Continued Importance

Each of these five factors goes to the heart of NEPA analysis. This is most clear with the fifth factor, in which the Tenth Circuit and several of its district courts have shown themselves on high alert to BLM's attempts to block the true informed decision making NEPA is meant to enable. Moreover, consideration of cumulative and indirect impacts are bedrocks of the CEQ guidelines controlling the NEPA process.[228] Courts in the Tenth Circuit are interpreting these requirements liberally to ensure climate change is adequately considered in agency decisions, but the root of these factors is found within the primary NEPA regulations. Similarly, requiring real consideration of alternatives is fundamental to NEPA analysis.[229] Courts in the Tenth Circuit are stepping in to ensure that BLM does not just nominally, but rather sufficiently, consider alternatives. As

224. WildEarth Guardians v. Bureau of Land Mgmt., 870 F 3d 1222, 1235 (10th Cir. 2017).
225. *Id.* at 1234–35.
226. *Citizens for a Healthy Cmty.*, 377 F. Supp. 3d at 1237.
227. San Juan Citizens Alliance v. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1254 (D.N M. 2018).
228. 40 C.F.R. § 1508.25, *supra* note 75.
229. In *WildEarth Guardians*, the Tenth Circuit explained that consideration of alternatives "is the heart of the [EIS]" under CEQ guidelines. *WildEarth Guardians*, 870 F.3d at 1226 (citing 40 C.F.R. § 1502.14).

the Tenth Circuit noted in *WildEarth Guardians*, failure to do so "defeats NEPA's purpose."[230] Finally, although using irrational assumptions or contradictory information is not directly stated in NEPA or the CEQ guidelines, this factor also speaks to the statute's fundamental purpose of enabling informed decision making. Agencies using assumptions based on nothing but guesswork and contradictions can hardly be considered to be making informed decisions.

While NEPA's lack of a mitigation requirement limits its ability to protect the environment,[231] the statute's bedrock principles requiring agencies to fully consider direct, indirect, and cumulative impacts of, and reasonable alternatives to, their proposed actions are important. These are tools that courts can use to ensure that agencies like BLM do not completely ignore facts while pursuing their plans for "energy dominance."[232] And while NEPA does not always block actions such as the fossil fuel extraction projects discussed in the aforementioned cases, litigation and court orders for proper NEPA analysis may delay projects.[233] In some instances, they may even lead to cancellation.[234] At the very least, the Tenth Circuit courts' reliance on these five factors is likely to slow the amount of fossil fuel extraction projects the Trump administration is able to fast-track to completion before a change in executive leadership.

D. Reasons for Caution

Although the Tenth Circuit and many of its district courts seem to be taking a bold stance against BLM's efforts to thwart NEPA's requirements, there are three reasons for caution about this trend. First, not every like case brought in Tenth Circuit courts since President Trump took office has resulted in a holding that BLM violated NEPA. Second, even in the cases where courts found some NEPA violations, they also upheld many of BLM's other actions. Third, even when courts found NEPA violations, they did not always vacate BLM decisions.

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230. *Id.* at 1237.

231. Agencies are not required to mitigate the effects they identify through NEPA analysis. "NEPA does not require a fully developed plan detailing what steps *will* be taken to mitigate adverse environmental impacts . . ." *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989). NEPA does not require that harms "actually be mitigated," although "it does require that an EIS discuss mitigation measures" in detail. S. Fork Band Council of W. Shoshone of Nevada v. Dep't of Interior, 588 F.3d 718, 727 (9th Cir. 2009). In contrast, the California Environmental Quality Act (CEQA) requires mitigation of a project's identified harmful effects by mandating that agencies "adopt feasible mitigation measures or alternatives to substantially lessen the significant effect before approving the project." Council on Envtl. Quality, Exec. Office of President of U.S. & Cal. Governor's Office of Planning & Research, *NEPA and CEQA Integrating Federal and State Environmental Reviews*, 38 (2014) (citing CAL. PUB. RES. CODE, §§ 21002 & 21002.1 (1976)), https://ceq.doe.gov/docs/ceq-publications/NEPA_CEQA_Handbook_Feb_2014.pdf.

232. *See* Remarks by President Trump at the Unleashing American Energy Event, *supra* note 27.

233. *See* Arnold W. Reitze, Jr., *The Role of NEPA in Fossil Fuel Resource Development and Use in the Western United States*, B.C. ENVTL. AFFAIRS L. REV. 283, 285 (2012).

234. *See id.*

1. A Potential Outlier to the Trend

Instead of conforming with the trend, at least one district court decision within the Tenth Circuit has fully upheld challenged BLM actions that otherwise appear similar to actions other district courts and the Court of Appeals have struck down. In *Southern Utah Wilderness Alliance v. Department of Interior*, the District Court for the District of Utah upheld BLM's issuance of oil and gas leases and rejection of certain alternatives.[235] BLM had "directly addressed" the plaintiffs' proposed deferral alternative and explained why it was unnecessary because it had enough information to make a decision, which plaintiffs did not refute.[236] BLM had rejected the plaintiffs' other proposed alternative of including stipulations on leases to limit harmful effects on wilderness, as previous land use decisions "explicitly considered and rejected" managing such areas for wilderness preservation.[237] Finally, the plaintiffs failed to demonstrate prejudice from any potential BLM error in rejecting proposed alternatives.[238] The Tenth Circuit dismissed the plaintiffs' appeal.[239]

This case might serve as a counterexample to the Tenth Circuit trend, because the courts upheld BLM's NEPA analysis and enabled the project to proceed. Yet, it might also demonstrate that the courts are paying close attention and carefully weighing whether alternatives were properly considered. In this case the agency rejected the plaintiffs' proposed alternatives after considering them, instead of failing to properly consider any, or to distinguish between, alternatives. The *Southern Utah Wilderness Alliance* court upheld BLM's rejection of the plaintiffs' proposed alternatives, determining that the agency had considered them and done so sufficiently.[240] It may also have been swayed by the fact that BLM suspended the drilling permits while completing further NEPA

235. 250 F. Supp. 3d 1068, 1072–73 (D. Utah 2017). Plaintiffs challenged BLM's decisions to issue four oil and gas leases and approve a well drilling project, alleging NEPA and Federal Public Lands Management Act violations. *Id.* at 1077–78. The court determined the Federal Public Lands Management Act claim was moot because the agency itself suspended the oil and gas well drilling project pending further NEPA analysis. *Id.* at 1087–88.

236. *Id.* at 1080–84.

237. *Id.* at 1081.

238. The court explained that even if BLM had incorrectly rejected the alternatives, the plaintiffs did not allege "prejudice beyond the rejection itself and [did] not show[] how the alleged errors so compromised BLM's analysis as to render the issuance of the leases arbitrary and capricious." *Id.* at 1084.

239. The Tenth Circuit dismissed the appeal as moot, determining it lacked subject matter jurisdiction because the plaintiffs had not challenged the district court's independent holding that they were not entitled to relief because they did not demonstrate prejudice. S. Utah Wilderness Alliance v. Dep't of Interior, 2019 WL 4233877 1, 2–3 (10th Cir. 2019). The opinion was written by Judge Allison Eid, who was appointed in 2017 by Republican President Trump. U.S. Court of Appeals for Tenth Circuit, *Judge Allison H. Eid*, https://www.ca10.uscourts.gov/judges/judge-allison-h.-eid (last visited Nov. 10, 2019). It was also before Judge Briscoe, appointed by President Clinton, and Judge Baldock, appointed by President Reagan. *See* U.S. Court of Appeals for Tenth Circuit, *Judge Mary Beck Briscoe, supra* note 152; U.S. Court of Appeals for Tenth Circuit, *Senior Judge Bobby R. Baldock*, *supra* note 155.

240. *S. Utah Wilderness Alliance*, 250 F. Supp. 3d at 1080–84.

analysis.[241] The Tenth Circuit did not weigh in on the merits of the appeal or confirm if the case fits within this trend.[242]

2. Courts Continue to Uphold Some of BLM's Challenged Actions

Furthermore, in each case where courts did find NEPA violations, they also rejected several other claims that BLM violated NEPA. In *Diné Citizens*, the Tenth Circuit affirmed the district court's approval of all but five challenged BLM decisions.[243] There were more than three hundred decisions at issue.[244] In *Wilderness Workshop*, the court upheld BLM's consideration of the cumulative impacts of its actions on climate change,[245] methane emissions,[246] and health effects.[247] Likewise, in *Citizens for a Healthy Community*, the court found the agencies sufficiently considered alternatives,[248] cumulative climate change impacts,[249] water resource and human health impacts,[250] cumulative air quality impacts,[251] and direct and cumulative water quantity impacts.[252] In *San Juan Citizens Alliance*, the court upheld BLM's consideration of water quality impacts[253] and cumulative air quality impacts.[254] While these holdings give weight to BLM's analyses, they do not necessarily counter the trend as the courts found other parts of the NEPA process on which to fault BLM. In cases where courts remanded for further NEPA analysis, perhaps finding one or more violations was sufficient to hold the agency accountable and pause the process enough to force BLM to reconsider, even if the court rejected several other alleged violations.

241. *Id.* at 1085–86.

242. *S. Utah Wilderness Alliance*, 2019 WL 4233877 at *3. While it did not expressly weigh in on the validity of the district court's first holding, claiming that if it did such a holding would be "purely advisory," the Tenth Circuit did say that "even if [it] agreed that the agency's failure to consider SUWA's proposed alternatives was arbitrary and capricious, the district court's prejudice finding would stand as an independent basis for its decision." *Id.* at 3.

243. Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 844–45, 850 (10th Cir. 2019).

244. *Id.* at 838.

245. Wilderness Workshop v. Bureau of Land Mgmt., 342 F. Supp. 3d 1145, 1158 (D. Colo. 2018).

246. *Id.* at 1161–62.

247. *Id.* at 1164.

248. Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1235 (D. Colo. 2019).

249. *Id.* at 1239.

250. *Id.* at 1242.

251. *Id.* at 1244.

252. *Id.* at 1245.

253. San Juan Citizens Alliance v. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1255 (D.N.M. 2018).

254. *Id.* at 1252.

3. The Remedies May Be Insufficient

Perhaps most importantly, the courts did not actually vacate the agency decisions they found unlawful in each of these cases. The Tenth Circuit in *High Country* explained the three main remedies it provides when it finds a NEPA violation: (1) reversing the district court's approval of the agency action and remanding without instructions, (2) "revers[ing] and remand[ing] with instructions to vacate" the agency action, or (3) vacating the challenged agency action.[255] In *WildEarth Guardians*, the Tenth Circuit did not vacate the challenged coal leases but rather provided the first remedy outlined above.[256] Although it held BLM violated NEPA in many ways, the Tenth Circuit did not vacate the leases but rather reversed and remanded to leave the district court the option to either vacate the entire EIS or records of decision, or to provide "narrower" relief.[257] In other instances, though, the courts did overturn BLM decisions and pursue the other options the *High Country* court referenced.[258] In *Diné Citizens*, the Tenth Circuit remanded, instructing the district court to vacate the FONSIs and APDs associated with the five faulty EAs and to remand those EAs for BLM to fix its NEPA analyses.[259] Similarly, in *San Juan Citizens Alliance*, the court set aside BLM's issuance of the challenged oil and gas leases and remanded to BLM for further NEPA analysis.[260] In both *Wilderness Workshop* and *Citizens for a Healthy Community*, the district courts took a middle ground, deferring a final ruling on remedies until the parties conferred and came to an agreement or provided further briefing.[261]

V. HOW ENVIRONMENTAL ADVOCATES CAN CAPITALIZE ON THE TENTH CIRCUIT TREND

Parties on both sides are starting to notice and act on this trend. In October of 2019, the acting head of BLM, William Perry Pendley, acknowledged that "courts are telling us you need to look at climate change when you do these NEPA documents . . . at greenhouse gases, look at all these things that go into addressing climate change."[262] Yet, he also expressed that President Trump is

255. High Country Conservation Advocates v. U.S. Forest Serv., 951 F.3d 1217, 1237 (10th Cir. 2020).
256. WildEarth Guardians v. Bureau of Land Mgmt., 870 F 3d 1222, 1240 (10th Cir. 2017).
257. *Id.*
258. *High Country Conservation Advocates*, 951 F.3d at 1217.
259. Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 859 (10th Cir. 2019).
260. San Juan Citizens Alliance v. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1256 (D.N M. 2018).
261. In *Wilderness Workshop*, the court ordered the parties to "confer and attempt in good faith to reach agreement as to remedies," and to submit briefs if they could not reach an agreement. Wilderness Workshop v. Bureau of Land Mgmt., 342 F. Supp. 3d 1145, 1167 (D. Colo. 2018). In *Citizens for a Healthy Community*, the court similarly ordered the parties to try to reach an agreement about remedies or otherwise submit briefs to the court. Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1247 (D. Colo. 2019).
262. Tripp Baltz, *Trump Better for Western States Than Reagan, Acting BLM Head Says*, BLOOMBERG L. NEWS (Oct. 11, 2019), https://www.bloomberglaw.com/product/es/document/X7UGLCH0000000.

continuing to "right[] the wrongs" of the Clinton and Obama administrations and take actions that he believes benefit western states.[263] Although Pendley loosely acknowledged this trend of courts demanding more from his agency—without particularly identifying the Tenth Circuit[264]—that alone does not mean BLM will begin consistently including climate change impacts in its NEPA analyses or fully complying with NEPA requirements.

In fact, several recent lawsuits filed in district courts in the Tenth Circuit suggest otherwise. Environmental advocates continue to bring suits alleging similar NEPA violations by BLM when enabling fossil fuel development projects,[265] including most notably a new lawsuit emanating from the same controversy as *Diné Citizens*.[266] Because the lawsuits discussed in this Note have not always succeeded,[267] this Part recommends litigation strategies for those challenging BLM decisions to approve fossil fuel development projects under NEPA.

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263. *Id.*

264. *Id.*

265. These cases include WildEarth Guardians v. Bernhardt, 1:19-cv-01920-RBJ (D. Colo. 2019); the consolidated cases Friends of Cedar Mesa v. Dep't of Interior, 4:19-cv-00013-DN-PK (D. Utah 2019) and S. Utah Wilderness Alliance v. Bernhardt, 2:19-cv-00266-DN (D. Utah 2019); Living Rivers v. Bernhardt, 4:19-cv-00041-DN (D. Utah 2019); and Ctr. for Biological Diversity v. Bernhardt, 1:19-cv-02869 (D. Colo. 2019); and Ctr. for Biological Diversity v. Bureau of Land Mgmt., 4:19-cv-07155 (N.D. Cal. 2019).

266. A similar group of plaintiffs filed a new challenge in New Mexico district court to BLM's approval of at least 255 separate APDs in the Mancos Shale area since 2016. *See* Diné Citizens Against Ruining our Env't v. Bernhardt (Diné Citizens III), 1:19-cv-00703 (D.N.M. 2019). The plaintiffs seek to vacate the EAs and FONSIs for the 255 challenged APDs and also asked the district court to issue a preliminary injunction to keep BLM from issuing any additional APDs for horizontal drilling or fracking in the area "pending full compliance with NEPA." Petition for Review of Agency Action at 28, *Diné Citizens III*, 1:19-cv-00703 (D.N.M. Aug. 1, 2019). The district court issued an initial order *sua sponte* in August of 2019, less than a month into the litigation. Order Regarding Setting of Hearing on Motion for Injunctive Relief at 1, *Diné Citizens III*, 1:19-cv-00703 (D.N.M. Aug. 1, 2019). In this order, the judge expressed that the parties had "unrealistic expectations" for the case's timeline. *Id.* Given the district's already heavy caseload, and several existing vacancies, the case would not proceed as quickly as the parties hoped. *See id.* at 2–3. Next, the court explained that it sees no basis for issuing a temporary restraining order and that the plaintiffs will have to show they are entitled to relief before obtaining a preliminary or permanent injunction. *See id.* Most notably, the court noted that the plaintiffs "rely heavily" on the Tenth Circuit's recent *Diné Citizens* decision. *Id.* While it acknowledged this decision will inevitably "factor heavily" into the merits analysis, the court explained that *Diné Citizens* had "practical limitations" in applying to this case. *Id.* at 4. It noted that the Tenth Circuit affirmed the dismissal of most claims except five related to cumulative water impacts and mentioned that perhaps BLM is taking steps to address these mistakes in other NEPA approvals. *Id.* This refiling demonstrates that, unsurprisingly, the parties who succeeded in *Diné Citizens* are aiming to capitalize on the decision by challenging additional BLM actions. However, it also implies limits to extrapolating from this trend, as the district court noted in its initial order. The plaintiffs framed the Tenth Circuit's *Diné Citizens* holding as applying to cumulative water and air quality impacts, while the holding was actually only limited to water impacts as there was an insufficient record for the court to consider the air quality impacts claims. The plaintiffs might do better in the rest of the litigation to focus their arguments on cumulative water impacts, where there is real precedent.

267. *See generally supra* Subpart IV.D.

As courts appear particularly protective of NEPA's fundamental purposes, plaintiffs should highlight any attempts by agencies to (1) subvert informed decision making or (2) rely on illogical assumptions. They should also (3) point out where BLM's decisions are made upon incomplete information, while ensuring the record they provide is thorough. Plaintiffs should furthermore point out any failures to consider (4) indirect or cumulative impacts or (5) reasonable alternatives. Moreover, they should consider arguing (6) that BLM is not entitled to deference in its decisions, especially if the decisions involve climate change analysis. Finally, because courts do not always vacate or overturn agency actions that violate NEPA, plaintiffs should (7) pursue supplemental strategies in addition to litigation. The fact that many of the factors this Note identifies flow directly from NEPA requirements or the statute's purposes is a boon to plaintiffs, who can characterize their claims not as novel extensions of the law but rather as firmly rooted in a longstanding environmental statute. However, the Trump administration's recent rollback of CEQ regulations[268] suggests that some of these strategies may be more effective than others if the new regulations are not overturned by the Biden administration.

A. Highlight Agency Attempts to Subvert Informed Decision Making

First, plaintiffs should aim to exploit any attempts by BLM to block NEPA's fundamental goals of enabling informed decision making or public participation. The Tenth Circuit and some of its district courts appear particularly sensitive to this factor. The Tenth Circuit criticized BLM's failure to properly consider alternatives in *WildEarth Guardians* as an affront to NEPA's purposes of ensuring informed decisions and public comment.[269] Similarly, in *Citizens for a Healthy Community*, the district court treated BLM's attempt to avoid analyzing indirect impacts as a threat to incentivize agencies to "skirt[] NEPA requirements," in contradiction with NEPA's goal of enabling informed decision making.[270] Notably, even though the Trump administration attempts to limit the reach of NEPA requirements in its most recent rollbacks, CEQ acknowledged that its proposed revisions aim to ensure that NEPA documents "serve their purpose of informing decision makers . . . and the public of the environmental issues in the pending decision-making process."[271] In instances where BLM appears to intentionally subvert informed decision making, plaintiffs should expose this to the court. In less direct instances, plaintiffs should still argue that the effect of BLM's actions hinders NEPA's goals, even if unintentional. This strategy may take on particular importance as arguments based on insufficient

268. *See supra* notes 40–52 for further discussion of the changes to CEQ regulations.

269. WildEarth Guardians v. Bureau of Land Mgmt., 870 F 3d 1222, 1237 (10th Cir. 2017).

270. Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1237 (D. Colo. 2019).

271. *See* Council on Envtl. Quality, *supra* note 40, at 1691. The notice of proposed rulemaking states that several of the proposed amendments aim to "promote informed decision making and to inform the public about the decision-making process." *See id.*

consideration of cumulative or indirect effects are diminished, in accordance with the changes to CEQ regulations.[272] NEPA's twin purposes are derived from the statute itself, so the regulation changes should not limit the viability of this kind of argument.[273] In fact, courts may even be more sympathetic to arguments about upholding NEPA's fundamental purposes in light of the administration's attempts to limit its effectiveness through regulatory rollbacks.

B. Point Out Contradictory or Irrational Agency Reasoning

Second, plaintiffs should look for ways BLM's reasoning is contradictory or irrational and highlight any bad faith efforts by BLM to have it both ways. The Tenth Circuit took issue with BLM's conduct in this regard in *WildEarth Guardians*, finding the agency's assumption both irrational and contradictory to another argument it made based on the same material.[274] Similarly, in *High Country*, the Tenth Circuit sharply critiqued USFS's faulty and circular logic, as it would exclude all alternatives from analysis besides the one the agency preferred and was not "logically coherent."[275] The District Court for the District of Colorado criticized BLM for doing something similar in *Wilderness Workshop* and *Citizens for a Healthy Community*, pointing out BLM's attempts to use the same information to make conflicting arguments.[276] This factor is not directly found in NEPA's statutory language, but the Tenth Circuit and many of its district courts appear on high alert for BLM's attempts to avoid NEPA requirements through irrational or contradictory reasoning. Thus, plaintiffs should carefully review agency records, and BLM's arguments in litigation, to identify any such efforts.

C. Challenge Agency Reasoning Based on Incomplete Information

Third, plaintiffs should create a thorough record and point out where BLM's decisions are based on incomplete information. In *WildEarth Guardians*, the Tenth Circuit found the fact that BLM's assumption had no support in the record besides its "own unsupported assumptions" was enough to find the assumption arbitrary and capricious.[277] It explained that BLM must provide a certain amount of data to support its choice of alternatives and had not done so.[278] Thus, plaintiffs should strongly emphasize any holes in the record where BLM's position lacks support. On a related note, the district court determined in *San*

272. *See supra* notes 40–52.

273. *See* Gilmer & Lee, *supra* note 52.

274. *WildEarth Guardians*, 870 F.3d at 1234, 1236.

275. High Country Conservation Advocates v. U.S. Forest Serv., 951 F.3d 1217, 1228, 1233–34 (10th Cir. 2020).

276. *See* Wilderness Workshop v. Bureau of Land Mgmt., 342 F. Supp. 3d 1145, 1156 (D. Colo. 2018); Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1237 (D. Colo. 2019).

277. *WildEarth Guardians*, 870 F.3d at 1234–35.

278. *Id.* at 1235.

Juan Citizens Alliance that although the agencies would obtain more information later, they had sufficient information at the time to analyze impacts and failed to do so.[279] Plaintiffs should accordingly point out if BLM failed to analyze something by claiming lack of data, when it did in fact have enough data to conduct a proper analysis. However, plaintiffs should also be careful to submit a complete record to support their own claims. In *Diné Citizens*, the Tenth Circuit several times noted what it considered to be a shocking lack of information in the record.[280] This largely incomplete record precluded the court from ruling on the "vast majority" of plaintiffs' claims,[281] and a more complete record may have led to a similarly strong holding about BLM's alleged failure to consider cumulative air quality impacts. Of course, plaintiffs may have resource constraints making it difficult to match the federal government's ability to prepare a thorough record. Yet, wherever possible, they should attempt to provide a complete record, or perhaps limit their claims to alleged violations for which they can provide a strong record. The new CEQ regulations will likely not threaten this strategy, although they might functionally lead to less information being considered in the record by imposing time limits for EA and EIS review.[282]

D. Illuminate Failures to Consider Indirect or Cumulative Impacts

Fourth, plaintiffs should search for any failures to consider indirect or cumulative impacts on water quality or quantity, air quality, climate change, and other relevant markers. In most of the cases discussed, courts found that BLM violated NEPA in some of the ways plaintiffs alleged, but not others. Even though courts often find for BLM on some claims, siding with plaintiffs on at least one can be sufficient to find a NEPA violation.[283] Thus, plaintiffs should cast a wide net because different claims have been successful in different cases. Yet, they should also be aware not to overly extend courts' holdings to fit their claims, as this strategy might backfire. In *Diné Citizens III*, the plaintiffs characterized the Tenth Circuit's holding in *Diné Citizens* as applying broadly to

279. San Juan Citizens All. v. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1254 (D.N.M. 2018).

280. Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 844–45, 852, 854–55 (10th Cir. 2019).

281. *Id.* at 844.

282. *See* Lee, *supra* note 45.

283. For example, in *Diné Citizens*, the Tenth Circuit found that BLM only violated NEPA by failing to consider cumulative water impacts in five instances, while upholding the roughly 300 remaining challenged agency actions. *Diné Citizens*, 923 F.3d at 838, 844–45, 850. Similarly, the *Citizens for a Healthy Community* court found the agencies violated NEPA by failing to consider indirect impacts, while upholding their consideration of alternatives and some cumulative impacts. Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1233–39, 1242, 1244–45 (D. Colo. 2019). In *San Juan Citizens Alliance*, the court held BLM violated NEPA by failing to consider indirect impacts while upholding the agency's consideration of water quality impacts and cumulative air quality impacts. San Juan Citizens All. v. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1244, 1252, 1254–55 (D.N.M. 2018).

cumulative impacts,[284] though it only applied to water impacts.[285] The district court's initial order suggests it is somewhat skeptical of the plaintiffs' over-reliance on *Diné Citizens*.[286] Plaintiffs should accordingly be careful not to over-extend the value of precedent to avoid losing credibility. This strategy is the most threatened by the CEQ regulation changes, as the final rule removes any distinction between direct, indirect, and cumulative effects and does not require agencies to consider cumulative impacts.[287] If the new regulations remain in effect, plaintiffs are not likely to succeed with arguments that the agencies failed to sufficiently consider indirect or cumulative impacts. However, there may remain some potential for plaintiffs to point to precedent where courts grounded their interpretation of cumulative or indirect impacts analysis within NEPA itself, rather than the current CEQ regulations.[288]

E. Challenge Nominal Considerations of Alternatives

Fifth, plaintiffs should evaluate how well BLM considered alternatives and challenge any nominal considerations. They can rely on the Tenth Circuit's strong holding in *WildEarth Guardians* that agencies must support their choice of alternatives with sufficient data in the record, as opposed to unsupported, irrational, or contradictory assumptions.[289] Plaintiffs can also draw from the Tenth Circuit's reasoning in *High Country* if the agency attempts to use circular logic to avoid considering a reasonable alternative.[290] At the same time, plaintiffs should recognize that failure to consider an alternative they propose is not necessarily a NEPA violation. The courts in *High Country Conservation Advocates* and *Southern Utah Wilderness Alliance* both upheld the agencies' rejection of plaintiffs' proposed alternatives because they found the agencies had offered sufficient explanations for rejecting them.[291] In *High Country Conservation Advocates*, the district court also noted that NEPA does not require agencies to "consider an unlimited number of alternatives."[292] This factor does not appear directly threatened by the recent regulatory changes, although once again the time limits for EA and EIS review[293] may functionally limit how

284. Petition for Review of Agency Action, Diné Citizens Against Ruining Our Env't v. Bernhardt, 1:19-cv-00703, at 1–2, 24 (D.N.M. Aug. 1, 2019). Plaintiffs define the challenged cumulative impacts as including impacts to air quality, to surface and groundwater resources, and to water quantity. *Id.* at 27.

285. *Diné Citizens*, 923 F.3d at 854.

286. Order Regarding Setting of Hearing on Motion For Injunctive Relief, *supra* note 266, at 3–4, Diné Citizens Against Ruining Our Env't v. Bernhardt, 1:19-cv-00703 (D.N.M. Aug. 1, 2019).

287. *See* Wortzel et al., *supra* note 49.

288. *See* Lee, *supra* note 45.

289. *Id.* at 1235.

290. High Country Conservation Advocates v. U.S. Forest Serv., 951 F.3d 1217, 1227–28 (10th Cir. 2020).

291. *Id.* at 1223, 1226–27; S. Utah Wilderness Alliance v. Dep't of Interior, 250 F. Supp. 3d 1068, 1080–84 (D. Utah 2017).

292. *High Country Conservation Advocates*, 951 F.3d at 1223, 1226.

293. *See* Lee, *supra* note 45.

thoroughly alternatives are considered. Yet, many of the cases discussed in this Note involved courts grappling with BLM's consideration of either alternatives, or cumulative and indirect impacts, or both. Thus, as the ability to make arguments based on cumulative or indirect impacts is limited, perhaps courts will be more sensitive to arguments based on incomplete alternatives analysis.

F. Suggest Limited Agency Deference for Climate Change Analysis

Sixth, plaintiffs should argue that BLM is not entitled to deference in its analyses involving climate change. The court in *Citizens for a Healthy Community* found that BLM was entitled to deference on its analysis of the project's GHG emissions and that the agency has discretion to decide to analyze the effects qualitatively rather than quantitatively,[294] suggesting that plaintiffs will not always succeed in challenging the manner in which BLM analyzes impacts if it has done so in a manner that complies with NEPA. Yet, plaintiffs should capitalize on the Tenth Circuit's reasoning in *WildEarth Guardians*, where it declined to defer to BLM on its climate change analysis because it determined that the question was not at "the frontiers of science."[295] This suggests that at least the Tenth Circuit is catching on to the fact that climate change is not a new phenomenon over which only agencies have expertise. Accordingly, plaintiffs should build on this statement, as well as the trend of cases where circuit and district courts have found NEPA violations for BLM's approval of fossil fuel projects, to frame their arguments not as novel, non-justiciable cases about political questions or necessitating deference to agency expertise, but rather well-established terrain in which courts can provide relief. This strategy also does not appear directly threatened by the recent regulatory changes, as agency deference is a matter determined largely by judicial precedent rather than regulations.

G. Pursue Complementary Strategies in Conjunction with Litigation

Finally, plaintiffs should keep in mind that even when courts hold BLM violated NEPA, they do not always vacate the agency's action and pause the projects. As discussed above, the Tenth Circuit did not vacate the coal leases in *WildEarth Guardians*,[296] although the district court did vacate the leases in *San Juan Citizens Alliance*.[297] In two cases, the district courts deferred a final ruling on remedies.[298] This may suggest the limited value of relief under NEPA, if in

294. The court "agree[d] with Defendants that it is within their discretion to decide when to analyze an effect quantitively or qualitatively" and found the agencies were not required to do a cost-benefit analysis. Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1240–41 (D. Colo. 2019).

295. WildEarth Guardians v. Bureau of Land Mgmt., 870 F 3d 1222, 1236 (10th Cir. 2017).

296. *Id.* at 1240.

297. San Juan Citizens Alliance v. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1256 (D.N M. 2018).

298. *See* Wilderness Workshop v. Bureau of Land Mgmt., 342 F. Supp. 3d 1145, 1167 (D. Colo. 2018); *Citizens for a Healthy Cmty.*, 377 F. Supp. 3d at 1247.

addition to not requiring agencies to mitigate the impacts of their projects, the statute does not always lead to pausing projects when agencies must redo parts of their analysis. Yet, there is at least value in the cases that do lead, and have led, courts to vacate BLM actions and slow the agency's pursuit of President Trump's "energy dominance" agenda during his tenure. I recommend that plaintiffs, particularly those who are non-profit organizations with robust membership, staff, and community coalitions, pursue other strategies for blocking such projects simultaneously to litigation. Plaintiffs can focus on garnering media attention and use grassroots campaigns to turn public opinion against such projects, which may be particularly persuasive when focusing on local water and air quality impacts, as in *Diné Citizens* and its progeny. These supplemental approaches will take on increased importance as the power of litigation strategies may lessen now that the CEQ regulations have been finalized. Although most of the litigation challenging BLM actions goes to the first fundamental NEPA goal of ensuring agencies make informed decisions, these supplemental strategies would speak to NEPA's second fundamental goal of encouraging public participation in agency decision making.

CONCLUSION

In the wake of federal courts' hesitance to provide injunctive or monetary relief from climate change through the common law, the Tenth Circuit and several of its associated district courts are holding agencies accountable for insufficiently considering the impacts of fossil fuel development projects under NEPA. Given the failure of the executive and legislative branches to sufficiently mitigate the nation's contributions to climate change, and the Trump administration's extensive intentional efforts to increase GHG emissions, this trend in the Tenth Circuit is promising. To be sure, the trend is limited in its reach. This approach to delaying BLM projects that will contribute further to climate change is site specific and resource intensive, given the high costs of litigation. It also does not provide damages for existing or past harms, instead only aiming to help prevent or slow additional harm. Furthermore, this approach does not mobilize the federal government to take overarching climate action,[299] but rather challenges individual agency decisions that enable further contributions to climate change.

Yet, over time, this trend in the Tenth Circuit may incentivize BLM to more adequately consider these impacts or limit the speed with which BLM is able to fast-track additional fossil fuel extraction projects initiated under the Trump administration or under any potential future administrations with a similar penchant for fossil fuel development. The ability for such cases to facilitate informed decision making may be limited as long as the agency has such a

299. In contrast, the *Juliana* plaintiffs sought broad remedies including national policies to mitigate climate change. Juliana v. United States, 217 F. Supp. 3d 1224, 1233, 1239 (D. Or. 2016).

directive of "energy dominance." Nonetheless, this approach has potential to enable NEPA's second primary goal to foster public awareness of and participation in agency decision making. Through this second, albeit less direct, route, climate activists may be able to help slow or stop proposed fossil fuel extraction projects through public pressure. Luckily for anyone affected by climate change—that is, everyone—the Biden administration appears poised to replace the Trump administration's "energy dominance" agenda with a climate action mandate. This shift in executive direction should enable climate activists to refocus their efforts from blocking an abundance of new fossil fuel projects to pressuring the federal government to enact even more ambitious climate policy to meet the scale of the crisis. Nevertheless, the Tenth Circuit trend remains important for courts to critically assess any fossil fuel projects proposed by the Trump administration that are still under review, or that may be proposed in the final days of his presidency. Hopefully no future administration will adopt a similar approach to fossil fuel based "energy dominance" and disregard of climate science as has President Trump. But if such a situation—or even a less extreme approach to pursuing fossil fuel development in a time when the world must rapidly decarbonize—should arise, the courts' commitment to upholding NEPA will remain an essential protection.

Of course, NEPA will not solve the United States' climate change challenges on its own. The statute does not require agencies to mitigate the harmful impacts of their actions on climate change or other environmental issues.[300] Yet, this Note has argued that the five factors which explain the trend in the Tenth Circuit are grounded in NEPA's basic structure.

This Note has also refuted the idea that judicial ideology can explain this trend, which is heartening in an age in which many view American courts as highly politicized.[301] However, it is unclear how long this trend will last in the Tenth Circuit. While judicial ideology has not as of yet determined the approach of the Tenth Circuit or its district courts to cases challenging BLM's approval of fossil fuel projects under NEPA, the trend may be on tenuous footing as President Trump continues to appoint judges to the circuit and district courts.[302] As of

300. In addition, some argue that NEPA "requires good faith leadership of the federal agencies" goals to be effective, and that in the wake of such leadership "the weaknesses of the NEPA process will make it a tool of limited value in adapting to climate change." Reitze, *supra* note 12, at 218.

301. A 2018 American Barometer poll found that 43 percent of American voters believe the Supreme Court is politically biased. Julia Manchester, *Hill.TV Poll 43 Percent of Voters Say Supreme Court is Biased*, HILL (Sept. 4, 2018), https://thehill.com/hilltv/what-americas-thinking/404956-43-of-americans-say-supreme-court-is-biased-says-hilltv-poll. *See also* Carl Hulse, *Political Polarization Takes Hold of the Supreme Court*, N.Y. TIMES (July 5, 2018), https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html. *See generally* Jon C. Rogowski & Andrew R. Stone, *How Politicized Judicial Nominations Polarize Attitudes Toward the Courts* (2018), https://scholar.harvard.edu/files/rogowski/files/scalia-conjoint.pdf?m=1527684806 (arguing that the American public views judicial nominees' impartiality and the Supreme Court's legitimacy through a polarized, partisan lens).

302. *See* Am. Constitution Soc'y, *Changing Circuit Court Composition*, https://www.acslaw.org/judicial-nominations/change-in-court-composition/ (last updated Dec. 10, 2019); Jason Zengerie, *How the Trump Administration is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), https:// www.nytimes.

November of 2020, the U.S. Senate had confirmed fifty-three of President Trump's judicial appointments to circuit courts (including two to the Tenth Circuit Court of Appeals) and 163 to district courts (including twelve to districts within the Tenth Circuit).[303] One circuit court nomination and thirty-two district court nominations are pending, while two circuit court vacancies and fifty-four district court vacancies remain.[304] Of these, four vacancies are in district courts within the Tenth Circuit, including two in the District of New Mexico.[305] Senator Mitch McConnell vowed in 2019 that his chamber, in tandem with President Trump, would fill all judicial vacancies by the end of the president's term in January 2021.[306] Some suggest this goal is unrealistic,[307] but there is no denying the long-lasting impact that President Trump's aggressive appointment strategy will have on the federal judiciary.

Statistics aside, President Trump's high—and climbing—appointment rate may well begin to add an element of judicial ideology into the Tenth Circuit trend, perhaps slowing or even reversing the trend. And while this Note has argued that NEPA provides the basic framework that has enabled circuit and district court judges in the Tenth Circuit to hold BLM accountable when necessary, the statute is only as strong as the courts that enforce it. Furthermore, CEQ's recent regulatory action to strongly curtail the impacts that must be considered in NEPA analysis presents further threats to the precedential value of the cases comprising this recent trend. However, as these cases continue to build momentum, hope remains that litigants will adapt their strategies to address changes in the judiciary and in the controlling regulations and that courts will find creative ways to enforce the fundamental purposes of the nation's foundational environmental statute.

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com/2018/08/22/magazine/trump-remaking-courts-judiciary.html; Tom McCarthy, *Trump's Legacy Conservative Judges Who Will Dominate US Law for Decades*, GUARDIAN (Mar. 10, 2019), https://www.theguardian.com/us-news/2019/mar/10/trump-legacy-conservative-judges-district-courts; Annie Pancak & Amanda James, *Trump Faces Long Odds in Race to Fill the Trial Courts*, LAW360 (Sept. 10, 2019), https:/ /www.law360 com/articles/1195696/trump-faces-long-odds-in-race-to-fill-the-trial-courts; Jimmy Hoover & Andrew Kragie, *Law360's Guide to Trump's Judicial Picks*, LAW360 (Nov. 10, 2020), https://www.law360.com/articles/963060/law360-s-guide-to-trump-s-judicial-picks.

303. *See* Hoover & Kragie, *supra* note 302.

304. Hoover & Kragie, *supra* note 302.

305. U.S. Courts, *Current Judicial Vacancies* (Nov. 11, 2020), https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies. No wonder Judge Johnson mentioned the court's overwhelming caseload and vacancies in the recent order issued in *Diné Citizens III*.
Order Regarding Setting of Hearing on Motion For Injunctive Relief at 1, Diné Citizens III, 1:19-cv-00703 (D.N.M. Aug. 1, 2019); *Diné Citizens III*, 1:19-cv-00703.

306. Jimmy Hoover, *McConnell Promises to Fill All Judicial Vacancies by 2021*, LAW360 (Sept. 5, 2019), https://www.law360.com/articles/1195971/mcconnell-promises-to-fill-all-judicial-vacancies-by-2021.

307. *See* Pancak & James, *supra* note 302.